

## **EXHIBIT 3**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

IN RE: )  
 ) CHAPTER 11  
HIGHLAND CAPITAL )  
MANAGEMENT, L.P., ) CASE NO. 19-34054-SGJ11  
 )  
Reorganized Debtor. )

REMOTE ORAL DEPOSITION OF  
BH EQUITIES, LLC

BY AND THROUGH ITS DESIGNATED REPRESENTATIVE

DUSTIN THOMAS

Des Moines, Iowa

Thursday, August 4, 2022

REPORTED REMOTELY BY:

JANICE K. McMORAN, CSR, RDR, CRR, TCRR

JOB NO. 213053

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1 BH EQUITIES, LLC - D. MILLER  
2 appreciate that.  
3 A. Thank you.  
4 Q. Can you just state your name for the  
5 record, sir?  
6 A. Yeah. My name is Dustin Thomas.  
7 Q. Okay. Mr. Thomas, are you employed  
8 today?  
9 A. I am.  
10 Q. By whom?  
11 A. That's not as easy as it might sound.  
12 But I work for BH Equities. We have a parent  
13 who I'm actually employed through with a master  
14 services agreement.  
15 Q. Okay.  
16 A. And the parent is BH Management  
17 Services.  
18 Q. And do you have a title?  
19 A. I do. I'm managing director of  
20 capital markets and investor relations.  
21 Q. Have you ever been deposed before?  
22 A. I have one other time.  
23 Q. Was it in a personal capacity or in a  
24 business?  
25 A. It was in a corporate capacity as a

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1 BH EQUITIES, LLC - D. MILLER  
2 that fair?  
3 A. That is fair.  
4 Q. Okay. From time to time, a lawyer  
5 might object to a question. Allow the lawyers  
6 to do their job and figure out what to do with  
7 the objection before you begin your answer. Is  
8 that understood?  
9 A. That is understood.  
10 Q. Okay. So what are your duties and  
11 responsibilities as a managing director of BH  
12 Equities?  
13 A. I -- BH Equities invests in various  
14 partnerships of real estate, and when we  
15 invest, I help with the structure of those,  
16 both debt and equity investment. And if we  
17 have outside capital, I'm a liaison for that  
18 outside capital.  
19 Q. So that -- is it fair to say that the  
20 nature of the business of BH Equities is to  
21 invest in real estate partnerships, or at least  
22 the primary business?  
23 A. I would say that, yeah, alongside  
24 sourcing investment opportunities for partners.  
25 Q. How long have you been with BH

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1 BH EQUITIES, LLC - D. MILLER  
2 just information witness.  
3 Q. And how long ago was that?  
4 A. Approximately three years, three and  
5 a half.  
6 Q. So really simple ground rules here.  
7 This is a deposition where I am going to ask  
8 questions and you'll provide answers. It's  
9 important that you allow me to finish my  
10 question before you begin an answer. Is that  
11 fair?  
12 A. That is fair.  
13 Q. And I will attempt to do the same and  
14 allow you to finish your answer before I begin  
15 a question, but if I fail to do so, will you  
16 let me know that?  
17 A. I will do my best.  
18 Q. If there's something that I ask that  
19 you don't understand, will you let me know  
20 that?  
21 A. I will.  
22 Q. If you need a break at any time, feel  
23 free to let me know and I'll do my best to  
24 accommodate you. I only request that you not  
25 seek a break while a question is pending. Is

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1 BH EQUITIES, LLC - D. MILLER  
2 Equities?  
3 A. Counting on my fingers, sorry. A  
4 little over six years.  
5 Q. And were you employed before being  
6 employed by BH Equities?  
7 A. I was.  
8 Q. Can you describe just briefly your  
9 professional background?  
10 A. Yeah. Prior to BH Equities, I was a  
11 partner in a private equity fund acquiring  
12 small businesses of, you know, 5 to 10 million  
13 of EBITDA. And prior to that, I was in private  
14 investment on the balance sheet of a power  
15 company.  
16 Q. Did you graduate from college?  
17 A. I did.  
18 Q. Where did you go to college?  
19 A. Simpson College, a liberal arts  
20 school in, Indianola, Iowa.  
21 Q. Do you have any graduate degrees?  
22 A. I do. I have a master's in business  
23 from the University of Iowa.  
24 Q. Do you hold any licenses or  
25 certificates?

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1 BH EQUITIES, LLC - D. MILLER

2 A. I do. I hold the chartered financial

3 analyst designation and the chartered

4 alternative investment analyst designation.

5 Q. Within the BH Equities corporate

6 structure, to whom do you report?

7 A. I report to Travis Sheets, our

8 general counsel.

9 Q. Have you spoken with -- are you

10 familiar with the entity called HCRE or what

11 was known as HCRE?

12 A. Only through our transactions.

13 Q. And have you spoken with anybody that

14 you believed was acting on behalf of HCRE in

15 connection with today's deposition?

16 A. I have not.

17 Q. Do you know whether anybody acting on

18 behalf of BH Equities has communicated with

19 anybody acting on behalf of HCRE concerning

20 today's deposition?

21 A. Not to my knowledge.

22 Q. I'd like to -- so from time to time

23 today, I'm going to ask my assistant, La Asia

24 Canty, to put some documents on the screen.

25 You know, this is not a test. Some of the

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1 BH EQUITIES, LLC - D. MILLER

2 restated LLC agreement that we'll talk about in

3 a few minutes that was called HCRE Partners,

4 LLC. I think you told me that you're familiar

5 with that entity, right?

6 A. Yes.

7 Q. And if I use the -- if I use the term

8 HCRE, that's the entity that I'll be referring

9 to, okay?

10 A. Uh-huh.

11 Q. And you're familiar with an entity

12 called SE Multifamily Holdings, LLC; is that

13 right?

14 A. Yeah.

15 Q. All right. I may refer to that

16 either as SE Multifamily or SEM. Is that fair?

17 A. Yes.

18 Q. Okay. And then I'm going to refer to

19 the entity either that you're employed by or

20 that you have a shared services agreement with

21 as either BH or BH Equities, okay?

22 A. Understood.

23 (Exhibit 1 marked.)

24 Q. Okay. So let's go back to the

25 subpoena. Have you seen this document before?

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1 BH EQUITIES, LLC - D. MILLER

2 documents that we'll put up there, obviously,

3 are very lengthy. I'm going to show you

4 portions of documents. It would be much easier

5 if we were in a room together. So that if you

6 think that there's portions of a document that

7 you need to read in order to -- in order to

8 have context, in order to kind of fully

9 understand the questions that I'm asking, will

10 you let me know that?

11 A. I will.

12 Q. Okay. So the first document that I'd

13 like to put up on the screen, which we've

14 marked as, let's call it BH-1, is the subpoena,

15 the amended subpoena that Highland served in

16 this case.

17 And before we get to that, actually,

18 I just want to deal with a few definitions.

19 As I mentioned at the beginning I

20 represent Highland Capital Management, L.P.

21 I'm going to try to refer to that entity as

22 HCMLP. Is that fair?

23 A. Yep, I understand that.

24 Q. Okay. And then there's another

25 entity that was a party to the amended and

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1 BH EQUITIES, LLC - D. MILLER

2 A. I have.

3 Q. Okay. And is it your understanding,

4 are you aware that you're giving testimony

5 today in your capacity as a corporate

6 representative of BH Equities?

7 A. Yes, I am aware.

8 Q. Okay.

9 MR. MORRIS: Can we go to, I guess

10 it's page 2 of the attachment? Yeah,

11 right there.

12 BY MR. MORRIS:

13 Q. Have you seen these topics before

14 today?

15 A. Yes, sir.

16 Q. And are you prepared to testify on

17 behalf of BH Equities as to each of these

18 topics?

19 A. I am.

20 Q. Did you do anything to prepare for

21 today's deposition?

22 A. I did.

23 Q. What did you do?

24 A. I reviewed the bulk of our discovery.

25 And, pardon me, the legal terms are not second

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1 BH EQUITIES, LLC - D. MILLER  
2 nature to me. And then I talked with Matt  
3 Mulcahy, as our BH Equities controller as well,  
4 on a couple of clarifications.  
5 Q. And when you used the phrase "the  
6 bulk of discovery," you're talking about the  
7 documents that BH Equities produced to Highland  
8 in response to the subpoena. Do I have that  
9 right?  
10 A. Correct.  
11 Q. Okay. And can you tell me for the  
12 record who -- it's Matt Mulcahy?  
13 A. Mulcahy, yes.  
14 Q. Okay. Who is Mr. Mulcahy?  
15 A. Mr. Mulcahy is the controller for BH  
16 Equities and its, you know, various investment  
17 subsidiaries.  
18 Q. Did Mr. Mulcahy play any role in  
19 connection with the SE Multifamily transaction?  
20 A. He would have coordinated certain  
21 accounting matters.  
22 Q. Other than Mr. Mulcahy and BH  
23 Equities' counsel, did you speak with anybody  
24 else to prepare for today's deposition?  
25 A. No, not directly.

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1 BH EQUITIES, LLC - D. MILLER  
2 Do you understand that?  
3 A. I do.  
4 Q. Okay. So other than -- other than  
5 your conversations with counsel and Mr. Mulcahy  
6 and your review of the e-mails that BH  
7 produced, that's the totality of your  
8 preparation for topic number 1? Do I have that  
9 right?  
10 A. Alongside with reading the agreement  
11 several times.  
12 Q. Okay. I appreciate that.  
13 Topic number 2 is Schedule A,  
14 including all communications with either HCMLP  
15 or HCRE concerning that Schedule A.  
16 Do you have an understanding of what  
17 Schedule A is?  
18 A. I do.  
19 Q. And do you believe that you are  
20 adequately prepared to testify as to that  
21 topic?  
22 A. I do.  
23 Q. Is there anybody that you think you  
24 should have spoken to about that topic that you  
25 kind of forgot to or that you wish you had?

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1 BH EQUITIES, LLC - D. MILLER  
2 Q. Did you speak with or communicate  
3 with anybody indirectly?  
4 A. Only review of e-mails that would  
5 have been part of the discovery package that we  
6 shared.  
7 Q. Okay. So looking at the screen,  
8 we're just going to take them one at a time.  
9 Do you see topic 1 there?  
10 A. Yes, sir.  
11 Q. Have you reviewed, to the best of  
12 your knowledge, all of the written  
13 communications between BH Equities and either  
14 HCRE or HCMLP relating to the amended  
15 agreement?  
16 A. To the best of my knowledge, I have.  
17 Q. Okay. And there's another phrase  
18 that I want to get out there. The subpoena  
19 defined amended LLC agreement as the agreement  
20 that was entered into on March 15th, 2019. Are  
21 you aware of that?  
22 A. I am.  
23 Q. All right. I may from time to time  
24 today use the phrase "amended agreement," and  
25 that's the agreement that I'll be referring to.

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1 BH EQUITIES, LLC - D. MILLER  
2 A. No. No. I came prepared.  
3 Q. Okay. Topic number 3 concerns your  
4 interests in SE Multifamily, including  
5 distributions or allocations made to you. And,  
6 as you may know, "you" is defined in the  
7 subpoena as BH Equities. Are you prepared to  
8 testify as to that topic?  
9 A. I am.  
10 Q. And, again, same answer for all four  
11 topics, the scope of document review are the  
12 documents that BH produced, correct?  
13 A. Correct.  
14 Q. Okay. And topic number 4 -- there's  
15 a reference to paragraph 5 of the response. Do  
16 you see that at the end of topic 4?  
17 A. Yes.  
18 Q. Okay. Have you seen that response?  
19 A. I believe I have.  
20 MR. DOHERTY: Just one second. Could  
21 we see what the response is defined as in  
22 the subpoena, Mr. Morris?  
23 MR. MORRIS: Sure, we can scroll up.  
24 MR. DOHERTY: Pardon me. I forgot  
25 which one it is.

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1 BH EQUITIES, LLC - D. MILLER  
2 MR. MORRIS: No problem. It's just  
3 NexPoint's written response to the claim  
4 objection.  
5 MR. DOHERTY: Okay. Thank you,  
6 Mr. Morris.  
7 BY MR. MORRIS:  
8 Q. All right. So let's go back to the  
9 topic. Mr. Thomas, have you personally ever  
10 seen the response?  
11 A. I believe that was provided to me,  
12 and I did review it.  
13 Q. Okay. And BH Equities is aware today  
14 of HCRE's contention as set forth in paragraph  
15 5, right?  
16 A. I believe so.  
17 Q. Do you know when BH Equities first  
18 learned -- actually, I'm going to use a defined  
19 term just to make our lives simpler. The  
20 quotation that we have in topic 4 says, "All  
21 facts and communications concerning HCRE's  
22 contention that" -- and then there's a  
23 quotation.  
24 Do you see that?  
25 A. Yes, sir.

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1 BH EQUITIES, LLC - D. MILLER  
2 agreement was effective as of August 23rd,  
3 2018, correct?  
4 A. I am.  
5 Q. Okay. Did you personally have any  
6 role in the negotiation of the amended  
7 agreement?  
8 A. I was involved in the back and forth  
9 and working with parties during the -- that  
10 time period to -- as the agreement was -- was  
11 going back and forth.  
12 Q. Were there any particular issues that  
13 you were personally focused on?  
14 A. Yes. The allocation -- the biggest  
15 issue was getting capital back to the parties  
16 prior to any allocations on percentages or  
17 those things that I was focused on.  
18 Q. Can you identify -- when did you  
19 first get involved in this project? Do you  
20 recall?  
21 A. Prior to the closing of the purchase  
22 of the assets, I would have been involved.  
23 Q. And when was the closing?  
24 A. I believe it was September 26th of  
25 2018.

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1 BH EQUITIES, LLC - D. MILLER  
2 Q. If I -- if I use the phrase  
3 "contention," will you know that I'm meaning  
4 that very quotation right there?  
5 A. I can understand that, yes.  
6 Q. Okay. So when did -- when did BH  
7 Equities first learn of HCRE's contention?  
8 A. I don't know for sure exactly when we  
9 first learned. I couldn't give you an exact  
10 date as to when corporately we learned about  
11 that contention. But we have been aware of it.  
12 Q. Can you tell me what year BH Equities  
13 first learned of the contention?  
14 A. I don't know exactly when we would  
15 have learned of that contention, no.  
16 Q. Okay. I'll come back to this with  
17 more specificity later on.  
18 MR. MORRIS: Let's take this down.  
19 BY MR. MORRIS:  
20 Q. And let's kind of cut to the chase a  
21 little bit. BH Equities entered into the  
22 amended agreement with HCMLP and HCRE and  
23 Liberty on March 15, 2019, correct?  
24 A. Correct.  
25 Q. Okay. And you're aware that that

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1 BH EQUITIES, LLC - D. MILLER  
2 Q. Can you identify for me all of the  
3 people acting on behalf of BH Equities that  
4 were, you know, primarily responsible for  
5 negotiating the amended agreement?  
6 A. Myself, Ben Roby, and Joanna  
7 Zabriskie, our president and CEO, would have  
8 been the most actively involved.  
9 Q. Did you have legal counsel involved  
10 in the review and negotiation or drafting of  
11 the amended agreement?  
12 A. We did.  
13 Q. And who was that?  
14 A. Nick Roby, previously Davis Brown,  
15 which is now part of Dentons.  
16 Q. So in addition to yourself and the  
17 president and Ben, you had outside counsel? Do  
18 I have that right?  
19 A. Yes.  
20 Q. Is there anybody else within BH  
21 Equities who was involved in the negotiation,  
22 drafting, or review of the amended agreement?  
23 A. Off the top of my head, I'm sure  
24 Travis Sheets would have been copied, at least  
25 on correspondence.

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1 BH EQUITIES, LLC - D. MILLER  
2 Q. Now, there were three other parties  
3 to the amended agreement, right? Liberty,  
4 HCRE, and HCMLP. Do I have that right?  
5 A. Yes, that's my understanding.  
6 Q. Are you able to identify for me the  
7 people who were representing the interests of  
8 each of those parties and the drafting,  
9 negotiation, and execution of the amended  
10 agreement? And if you want me to take them one  
11 at a time, I'm happy to.  
12 A. Yeah, that would be...  
13 Q. From BH Equities' perspective as you  
14 were negotiating this agreement, did BH  
15 Equities form a view that HCMLP and HCRE and  
16 Liberty were related parties?  
17 A. Yes.  
18 Q. And did -- was this more of a  
19 bilateral negotiation between BH Equities on  
20 the one hand and HCMLP and HCRE and Liberty on  
21 the other hand?  
22 A. Yes.  
23 Q. Can you identify the people who were  
24 working on behalf of -- withdrawn.  
25 Based on that, for convenience I'm

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1 BH EQUITIES, LLC - D. MILLER  
2 didn't correspond with them directly.  
3 Q. Fair enough.  
4 How about Matt McGraner? Is he  
5 somebody who was involved on behalf of Highland  
6 in the negotiation, drafting, and review of the  
7 amended agreement?  
8 A. I did not have direct correspondence  
9 with Mr. McGraner on the topic.  
10 Q. Do you know -- was there anybody  
11 involved in the negotiation or drafting of the  
12 agreement who BH Equities believed was looking  
13 out exclusively for the interests of HCMLP?  
14 A. As -- you know, kind of in the  
15 framing of your question, we were viewing them  
16 as a bilateral entity. So -- so I can't say  
17 for certain if they were or weren't as to  
18 who -- who was looking after what interest.  
19 Q. And that's all I'm asking for is the  
20 perspective of BH Equities, was there anybody  
21 from BH Equities' perspective that BH Equities  
22 believed was looking out only for HCMLP's  
23 interests?  
24 A. Again, we viewed them as related  
25 parties and coordinating amongst themselves as

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1 BH EQUITIES, LLC - D. MILLER  
2 going to use the phrase "Highland" to refer  
3 to -- withdrawn.  
4 I'm going to use the phrase  
5 "Highland" to refer to HCRE, HCMLP, and  
6 Liberty. Is that okay?  
7 A. That's okay, yes.  
8 Q. Okay. Can you identify for me the  
9 individuals who were representing the interests  
10 of Highland in connection with the negotiation  
11 of the amended agreement?  
12 A. I can identify my primary  
13 correspondence during that time. Is that  
14 acceptable?  
15 Q. Sure.  
16 A. I was primarily corresponding with  
17 Paul Broadus. Freddy Chang was cc'd on much  
18 of the correspondence and occasionally chimed  
19 in. And then only by copy of e-mail, I  
20 believe, Wick Phillips was the law firm  
21 representing and working with them.  
22 Q. And was Wick Phillips involved in the  
23 drafting, negotiation, or review of the amended  
24 LLC agreement, to the best of your knowledge?  
25 A. I can't say for certain because I

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1 BH EQUITIES, LLC - D. MILLER  
2 necessary. But we viewed it as a bilateral  
3 negotiation, as you framed it.  
4 Q. Did you ever -- to the best of your  
5 knowledge, did BH Equities ever communicate  
6 with anybody who claimed to represent the  
7 exclusive interests of Liberty?  
8 A. Not to my knowledge.  
9 Q. And to the best of BH Equities'  
10 knowledge, did anybody ever represent to BH  
11 Equities that there was an individual who was  
12 looking out for the exclusive interests of  
13 HCRE?  
14 A. Again, we lumped HCRE and HCM kind of  
15 together as the two -- the two large parties  
16 kind of, you know, related and things. So  
17 exclusively, no, given that context.  
18 Q. Okay. Are you familiar with the  
19 phrase "Project Unicorn"?  
20 A. I am.  
21 Q. Do you have an understanding of what  
22 that phrase means?  
23 A. Yes.  
24 Q. And what's your understanding of the  
25 phrase "Project Unicorn"?



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1 BH EQUITIES, LLC - D. MILLER

2 A. Project Unicorn was a marketing

3 phrase for a portfolio of -- I believe it was

4 26 properties marketed by -- by CBRE as

5 Starwood was -- as Starwood or Starwood

6 affiliates were selling these properties, and

7 they were purchased by SE Multifamily LLC.

8 Q. All right. Do you know why this

9 project was given the name Project Unicorn?

10 A. No, sir.

11 Q. Sometimes people use the word unicorn

12 to refer to something unique. Did you ever

13 participate in any discussions with anybody

14 where they suggested that they were, you know,

15 unique or rare features of a transaction of

16 this type?

17 A. My understanding is the designation

18 was given by the marketing firm, which would be

19 in line with precedent that the investment bank

20 or brokerage firm would give the project its

21 name. And it's typically under -- included in

22 the NDA and things like that.

23 Q. Okay. Do you know when BH Equities

24 first learned of Project Unicorn?

25 A. Specifically, no. It would have been

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1 BH EQUITIES, LLC - D. MILLER

2 signatory to the KeyBank loan, is it?

3 A. That's correct.

4 Q. Okay. Did BH Equities provide any

5 services or any resources, including capital of

6 any kind, in connection with the negotiation or

7 drafting of the KeyBank loan?

8 A. That's a bit nuanced. There was

9 underwriting and things like that done on

10 behalf of all parties involved. Underwriting,

11 diligence, those kinds of things, which I'm

12 certain was used as part of the negotiation

13 work with KeyBank to secure the loan.

14 Q. Were you working with Highland on

15 obtaining the KeyBank loan?

16 A. Again, it's nuanced. Directly

17 working as an agent or things like that, no.

18 Q. Were they keeping you informed?

19 A. In parts, yes. It was an important

20 capitalization to the transaction.

21 Q. Is it BH Equities' understanding that

22 the KeyBank loan was a necessary component to

23 the closing of the transaction on September

24 26th?

25 A. Yes.

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1 BH EQUITIES, LLC - D. MILLER

2 the summer of 2018.

3 Q. Do you know how BH Equities learned

4 about Project Unicorn?

5 A. I believe it was introduced to us

6 through the -- I'm going to use your term

7 prior, kind of Highland broadly, the HCRE, HCM,

8 you know, group.

9 Q. Is BH Equities aware that HCRE and

10 HCMLP entered into an LLC agreement with

11 respect to SE Multifamily in August of 2018?

12 A. We were given copies of that at some

13 point along the way, yes.

14 Q. Are you aware that HCRE, HCMLP, and

15 certain other borrowers obtained a loan from

16 KeyBank in September 2018 related to Project

17 Unicorn?

18 A. Yes.

19 Q. Did BH Equities have anything to do

20 with the KeyBank loan?

21 MR. GAMEROS: Objection -- objection,

22 form.

23 BY MR. MORRIS:

24 Q. That's fair. Let me restate the

25 question, Mr. Thomas. BH Equities is not a

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1 BH EQUITIES, LLC - D. MILLER

2 Q. SEC Multifamily -- withdrawn.

3 To the best of BH Equities'

4 knowledge, SE Multifamily could not have

5 financed the acquisition of the 26 properties

6 at the end of September without obtaining the

7 KeyBank loan; is that fair?

8 A. That's my understanding.

9 Q. Did there come a time when

10 BH Equities began to negotiate with Highland

11 about a potential participation interest in SE

12 Multifamily?

13 A. Yeah, it was always expected we would

14 participate in the -- in the LLC through

15 capital and, you know, sharing of return of

16 capital and profits and things, yes.

17 Q. Okay. Focusing solely on 2018, did

18 BH Equities loan any money to SE Multifamily in

19 the year 2018?

20 A. Not to my knowledge.

21 Q. Do you know if BH Equities loaned

22 money to anybody in connection with Project

23 Unicorn in 2018?

24 A. Not -- not to my knowledge.

25 Q. And as opposed to loans, do you know



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1 BH EQUITIES, LLC - D. MILLER

2 whether BH Equities made any investment in SE

3 Multifamily in the year 2018?

4 A. Yes, we did.

5 Q. Okay. Can you describe for me the

6 investment that BH Equities made in SE

7 Multifamily in 2018?

8 A. The investment in totality was

9 approximately 21.5 million, I believe.

10 Q. And when you say it was made in 2018,

11 is that because the agreement was ultimately

12 made effective as of August 2018, or was the

13 actual cash -- well, withdrawn. Let me ask

14 this.

15 You mentioned a \$21 million

16 investment. Is that an actual cash outlay by

17 BH Equities?

18 A. Yes.

19 Q. And where did that money go, do you

20 know?

21 A. If went to purchase the properties.

22 Q. And do you know when BH Equities made

23 the \$21 million investment?

24 A. It would have been in tranches

25 between the -- and, again, I'm using air quotes

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1 BH EQUITIES, LLC - D. MILLER

2 member of SE Multifamily at that time. So it

3 was a known fact amongst all the parties

4 participating.

5 Q. And when you use the phrase

6 "parties," are you talking about the parties

7 that ultimately became members of SE

8 Multifamily or something else?

9 A. Yes. Yeah, the additional members

10 and parties there.

11 Q. Do you know if KeyBank was aware of

12 the role that BH Equities was playing?

13 A. I don't know specifically, as we

14 weren't involved. I would assume so, though.

15 Q. Prior to 2018, had any agreement been

16 reached on the nature of the interest that

17 BH Equities was going to receive in exchange

18 for its \$21 million investment?

19 A. I don't believe there was anything

20 formal fully agreed to at that time.

21 Q. BH Equities ultimately obtained a

22 6 percent interest in SE Multifamily, right?

23 A. It's more nuanced than that. I'm

24 sorry, I don't mean to avoid the question, but

25 given the -- the written how capital flows and

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1 BH EQUITIES, LLC - D. MILLER

2 here -- the broad Highland group entities,

3 HCRE, HCM, et cetera. There are expenses

4 leading up such as, you know, earnest money,

5 loan app fees, those kind of things, and we

6 would have likely shared in parts of that. And

7 then by the time the transaction closed on

8 September 26th, the remaining funds would have

9 been invested, likely funded through title,

10 potentially a little bit directly to a bank

11 account. But the bulk would have gone through

12 title or to pay for pre- -- preclosing

13 expenses.

14 Q. And so do I have this right, that BH

15 Equities laid out the \$21 million in 2018

16 before there was an actual written agreement?

17 A. That is correct.

18 MR. DOHERTY: Objection, form.

19 BY MR. MORRIS:

20 Q. Was the \$21 million investment the

21 subject of negotiation? Like, how was that

22 number arrived at?

23 A. It was -- it was a number used to

24 close the transaction, and all parties were

25 aware that BH was investing that money as a

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2 things like that, it's more nuanced than just

3 the 6 percent. So I -- so I wouldn't say that

4 we only had a 6 percent interest, so to speak.

5 Q. How would you characterize

6 BH Equities' interest in SE Multifamily? How

7 would you describe it?

8 A. The expectation was we would give

9 capital back, and then the residual interest

10 thereafter was what was up for negotiation.

11 Q. What do you mean, it was up for

12 negotiation?

13 MR. DOHERTY: Objection. And I don't

14 want to make it -- John, you can tell me

15 not to say anything. I think I see a

16 disconnect, but if you want me to let you

17 proceed, I will.

18 MR. MORRIS: Yeah, go ahead, Casey.

19 I appreciate it. Go ahead.

20 MR. DOHERTY: Okay. I think there

21 might be a disconnect on -- with at least

22 for me on the time -- the time frame for

23 the question, about after the amended

24 agreement or before about --

25 MR. MORRIS: Ah, okay.

<p style="text-align: right;">Page 38</p> <p>1 BH EQUITIES, LLC - D. MILLER</p> <p>2 MR. DOHERTY: That's just my humble</p> <p>3 suggestion there, but I'll -- okay. All</p> <p>4 right.</p> <p>5 MR. MORRIS: I appreciate that.</p> <p>6 BY MR. MORRIS:</p> <p>7 Q. In the amended agreement as executed,</p> <p>8 did BH Equities obtain a 6 percent equity</p> <p>9 interest in SE Multifamily?</p> <p>10 A. Again, it's more nuanced than that.</p> <p>11 We have six -- we have an interest of 6 percent</p> <p>12 after the return of capital and those things,</p> <p>13 as the agreement was written.</p> <p>14 Q. Okay. So after capital is returned,</p> <p>15 SE Multifamily -- withdrawn.</p> <p>16 After the original capital investment</p> <p>17 is returned, BH Equities would have a 6 percent</p> <p>18 interest in SE Multifamily. Do I have that</p> <p>19 right?</p> <p>20 A. Yes, that's a correct</p> <p>21 characterization.</p> <p>22 Q. Okay. And at what point in time was</p> <p>23 an agreement reached that BH Equities would</p> <p>24 receive 6 percent of SE Multifamily after the</p> <p>25 return of the initial capital? Was that done</p>	<p style="text-align: right;">Page 39</p> <p>1 BH EQUITIES, LLC - D. MILLER</p> <p>2 in 2018? I'm just trying to get a timeline.</p> <p>3 A. That was -- that was finalized in</p> <p>4 March of '19 formally.</p> <p>5 Q. Okay. So at the time in 2018 that</p> <p>6 BH Equities laid out the \$21 million, there not</p> <p>7 only had not been a written agreement, but</p> <p>8 there had not yet been an agreement as to the</p> <p>9 nature and extent of BH Equities' interest in</p> <p>10 SE Multifamily. Is that fair?</p> <p>11 MR. DOHERTY: Objection, form.</p> <p>12 You may answer, Mr. Thomas.</p> <p>13 A. I don't think that it's fair. There</p> <p>14 was multiple discussions and things like that.</p> <p>15 No written agreement is fair. But there was</p> <p>16 ongoing discussions trying to formalize things.</p> <p>17 Q. Okay. Let's turn our attention to</p> <p>18 HCRE. Do you know whether HCRE ever loaned any</p> <p>19 money to SE Multifamily?</p> <p>20 A. I don't believe they did.</p> <p>21 Q. Do you know if HCMLP ever loaned any</p> <p>22 money to SE Multifamily?</p> <p>23 A. Could I ask for clarification around</p> <p>24 the idea of "loan," just so we're on the same</p> <p>25 page there? For both HCRE and HCM. I just</p>
<p style="text-align: right;">Page 40</p> <p>1 BH EQUITIES, LLC - D. MILLER</p> <p>2 want to make sure I'm answering the question</p> <p>3 you're asking here.</p> <p>4 Q. Sure. Like a loan like an IOU where</p> <p>5 you give someone money with the expectation</p> <p>6 that it would be returned with interest that's</p> <p>7 not -- that's not dependent on the outcome of</p> <p>8 the enterprise.</p> <p>9 A. No, I don't believe there were any</p> <p>10 loans provided by either party.</p> <p>11 Q. All right. Let's get to the LLC</p> <p>12 agreement itself.</p> <p>13 MR. MORRIS: If we can put that on</p> <p>14 the screen. We'll mark it as BH</p> <p>15 Exhibit 2.</p> <p>16 (Exhibit 2 marked.)</p> <p>17 BY MR. MORRIS:</p> <p>18 Q. And you've seen this document before,</p> <p>19 right, sir?</p> <p>20 A. Yes, sir.</p> <p>21 Q. And you've reviewed it in preparation</p> <p>22 for today's deposition, correct?</p> <p>23 A. I have.</p> <p>24 Q. All right.</p> <p>25 MR. MORRIS: If we could go to the</p>	<p style="text-align: right;">Page 41</p> <p>1 BH EQUITIES, LLC - D. MILLER</p> <p>2 signature page.</p> <p>3 BY MR. MORRIS:</p> <p>4 Q. Do you see that the document was</p> <p>5 signed on behalf of HCMLP and HCRE by James</p> <p>6 Dondero?</p> <p>7 A. I do.</p> <p>8 Q. Do you know who Mr. Dondero is?</p> <p>9 A. Yes.</p> <p>10 Q. And who do you understand Mr. Dondero</p> <p>11 to be?</p> <p>12 A. My understanding is he was a primary</p> <p>13 owner of both parties and a manager or</p> <p>14 executive in that capacity as well, you know,</p> <p>15 CEO type.</p> <p>16 Q. And what's the basis for that</p> <p>17 understanding?</p> <p>18 A. Just understanding of the parties',</p> <p>19 you know, business as -- you know, and our</p> <p>20 perspective as a partner.</p> <p>21 Q. Did anybody from Highland ever</p> <p>22 explain to you or anybody at BH Equities who</p> <p>23 Mr. Dondero was?</p> <p>24 A. Not specifically, no. But -- at</p> <p>25 least not to my understanding.</p>

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1 BH EQUITIES, LLC - D. MILLER

2 MR. MORRIS: Can we scroll down to --

3 BY MR. MORRIS:

4 Q. Do you see that right there is the

5 signature of Grant Scott, the director of

6 Liberty CLO Holdco, Ltd.?

7 A. I do.

8 Q. Do you know who Mr. Scott is?

9 A. I do not.

10 Q. Did you ever speak with Mr. Scott?

11 A. I don't believe so.

12 Q. Do you know if anybody on behalf of

13 BH Equities ever communicated with Mr. Scott in

14 any way about this amended agreement?

15 A. Not to my knowledge.

16 Q. Did you ever see any comments that

17 were made on behalf of Liberty concerning this

18 agreement?

19 A. No.

20 Q. Is it fair to say that there were

21 various drafts of this agreement prepared

22 before it was signed?

23 A. Yes.

24 Q. Do you recall when the first draft

25 was prepared?

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1 BH EQUITIES, LLC - D. MILLER

2 by Highland?

3 A. Yes.

4 Q. Do you recall how many drafts of the

5 agreement the parties went through?

6 A. A specific number, no. A handful, to

7 give it, you know, an order of magnitude, I

8 guess.

9 MR. MORRIS: Can we scroll to the

10 next one, please?

11 BY MR. MORRIS:

12 Q. There's the signature of Ben Roby.

13 Do you see that?

14 A. Yes, sir.

15 Q. That's the person that I think you

16 identified earlier today as someone who was

17 involved in Project Unicorn on behalf of

18 BH Equities. Do I have that right?

19 A. Correct.

20 Q. And I apologize if you testified to

21 this earlier, but can you remind me, then, of

22 what role Mr. Roby played within BH Equities?

23 A. At the time he was an acquisition

24 manager focused on acquiring properties in

25 which we made investments.

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1 BH EQUITIES, LLC - D. MILLER

2 A. I believe it was on March 14th.

3 Q. Who was the scribe, if you will?

4 Who was in charge of drafting this amended

5 agreement?

6 MR. DOHERTY: Objection, form.

7 MR. MORRIS: Withdrawn.

8 BY MR. MORRIS:

9 Q. Do you know who drafted this amended

10 agreement?

11 A. I do not specifically, no.

12 Q. Was it Highland or was it

13 BH Equities?

14 A. It was not BH --

15 MR. DOHERTY: Objection -- hold on.

16 THE WITNESS: I'm sorry.

17 MR. DOHERTY: It's hard virtually,

18 Mr. Thomas.

19 Objection. Objection, form. I'm

20 sorry. You can answer the question.

21 A. BH Equities was not the drafter.

22 BY MR. MORRIS:

23 Q. And so is it fair to say from

24 BH Equities' perspective that BH Equities

25 provided comments to drafts that were created

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1 BH EQUITIES, LLC - D. MILLER

2 Q. Was there an internal process for

3 reviewing documents like this before execution?

4 MR. DOHERTY: Objection. I want to

5 say, too -- I think this question is fair,

6 but if it goes into what attorneys said or

7 did, Mr. Thomas, you're not to go into

8 details of it.

9 But I just wanted to qualify that,

10 Mr. Morris, for the question. It's a fair

11 question, but I just wanted to make that

12 statement.

13 Go ahead, Mr. Thomas.

14 A. Yeah, this agreement was somewhat

15 fast moving. So I would say it didn't go

16 through the typical process. But Ben, Joanna,

17 and myself were communicating frequently over

18 the couple of days as it was going back and

19 forth.

20 Q. Does BH Equities believe today that

21 it had sufficient time to review the document

22 before signing?

23 A. I believe we knew -- I believe we

24 understood the economics portion of the

25 document as it affected us at the time we

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1 BH EQUITIES, LLC - D. MILLER  
2 signed it.  
3 Q. Okay. Before signing -- before  
4 BH Equities signed the amended agreement, did  
5 BH Equities take steps to make sure that the  
6 document reflected BH Equities' intent?  
7 A. Yes.  
8 Q. At the time BH Equities signed the  
9 amended agreement, did BH Equities believe that  
10 the amended agreement was consistent with BH  
11 Equities' intent?  
12 A. We were prepared to abide by the  
13 agreement as written. There were certain  
14 pieces we hoped to maybe further negotiate, but  
15 we understood the agreement and the economic  
16 relationship at the time.  
17 Q. Is there anything about the amended  
18 agreement that BH Equities believed was  
19 inconsistent with its intent at the time it  
20 signed the document?  
21 MR. DOHERTY: Objection, form.  
22 BY MR. MORRIS:  
23 Q. You can answer.  
24 A. Yeah. I struggle with the word  
25 "intent." There were certain parts we didn't

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1 BH EQUITIES, LLC - D. MILLER  
2 A. Can you clarify if we're talking  
3 about HCMLP, as we talked about the -- as the  
4 bilateral, yes, there would have been e-mail  
5 communication that we had hoped to have a  
6 larger residual interest than 6 percent.  
7 Q. Okay. And notwithstanding that hope,  
8 BH Equities nevertheless entered into this  
9 agreement with their eyes open, right? They  
10 understood that they were getting a 6 percent  
11 residual interest that could only be changed if  
12 the parties agreed in the future to amend the  
13 agreement, right?  
14 A. Yes.  
15 Q. Okay. Is there any other piece of  
16 amended agreement that BH Equities hoped to  
17 change in the future?  
18 MR. DOHERTY: Objection, form.  
19 And I want to, again, Mr. Thomas, if  
20 it involves legal analysis --  
21 MR. MORRIS: Withdrawn. That's fair.  
22 I'll rephrase the question, Casey.  
23 BY MR. MORRIS:  
24 Q. Is there any other issue that  
25 BH Equities told Highland that it wasn't happy

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1 BH EQUITIES, LLC - D. MILLER  
2 like or hoped to further discuss, negotiate,  
3 but we understood the relationship and -- of  
4 capital and return of capital and further  
5 economics at that time, and signed  
6 understanding those.  
7 Q. Can you identify for me the parts  
8 that BH Equities didn't like but it hoped that  
9 it would be able to renegotiate?  
10 MR. DOHERTY: Objection, form.  
11 And, Mr. Thomas, if this goes into,  
12 you know, legal analysis from attorneys,  
13 then just be careful.  
14 A. From a business standpoint, we had  
15 hoped to increase the 6 percent residual  
16 interest after capital was returned.  
17 BY MR. MORRIS:  
18 Q. And did you have any discussions  
19 with -- withdrawn. I don't mean to personalize  
20 this.  
21 Did BH Equities have any  
22 communications with Highland prior to the  
23 execution of this agreement about BH Equities'  
24 desire to increase the 6 percent residual  
25 interest?

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1 BH EQUITIES, LLC - D. MILLER  
2 with at the time it signed the agreement and  
3 that it hoped to negotiate an amendment for?  
4 A. Not to my knowledge.  
5 Q. At the time BH Equities signed the  
6 amended agreement, did BH Equities have any  
7 reason to believe that the agreement did not  
8 reflect the intent of all of the members of  
9 SEM?  
10 MR. DOHERTY: Objection, form.  
11 BY MR. MORRIS:  
12 Q. You can answer.  
13 A. As far as I know, or as far as we  
14 knew, no, we did not have any direct knowledge.  
15 Q. So kind of the flip side to that, is  
16 it fair to say that at the time BH Equities  
17 signed this agreement on March 15th,  
18 BH Equities believed that the agreement  
19 reflected the intent of the parties?  
20 MR. DOHERTY: Objection, form.  
21 MR. MORRIS: What's the objection?  
22 MR. DOHERTY: This intent about him  
23 knowing what the other side thinks. But I  
24 understand your question, but just  
25 maybe --

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1 BH EQUITIES, LLC - D. MILLER

2 MR. MORRIS: I'll rephrase the

3 question.

4 MR. DOHERTY: Okay.

5 BY MR. MORRIS:

6 Q. At any time prior to the -- to March

7 15th, did anybody acting on behalf of Highland

8 inform BH Equities that it believed any aspect

9 of the amended agreement was inconsistent with

10 Highland's intent?

11 A. Not that I'm aware.

12 MR. MORRIS: Hey, Casey, you were

13 spot on. Thank you. That was a better

14 question.

15 BY MR. MORRIS:

16 Q. At the time BH Equities signed the

17 amended agreement, did BH Equities have any

18 reason to believe that the amended agreement

19 contained any errors or mistakes?

20 A. No, I don't believe so.

21 Q. Was BH Equities aware of any error or

22 mistake in the amended agreement at the time it

23 signed it?

24 A. No. Not related to anything that we

25 were focused on.

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1 BH EQUITIES, LLC - D. MILLER

2 complete or accurate, just let me know, okay?

3 A. Okay.

4 Q. All right. So this is Schedule A to

5 the amended agreement. Do you see that?

6 A. Yes.

7 Q. And you've seen this page before,

8 correct?

9 A. Correct.

10 Q. And this page shows that Highland

11 Capital Management, L.P. made a capital

12 contribution of \$49,000. Do I have that right?

13 A. Yes.

14 Q. And it also shows that Highland

15 Capital Management, L.P. had a 46.06 percentage

16 interest in SE Multifamily, correct?

17 A. Yes, that's what it says.

18 Q. Okay. And those facts were known to

19 BH Equities at or before the time it signed

20 this amended agreement, correct?

21 A. Correct.

22 Q. In fact, BH Equities agreed that

23 HCMLP would hold a 46.06 percentage interest in

24 SE Multifamily while making a capital

25 contribution of \$49,000, correct?

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1 BH EQUITIES, LLC - D. MILLER

2 Q. Did anybody acting on behalf of

3 Highland ever inform BH Equities prior to the

4 execution of the agreement that Highland

5 believed there was an error or mistake in that

6 document?

7 A. No, not to my knowledge.

8 Q. All right.

9 MR. MORRIS: Let's go to Schedule A,

10 please.

11 MR. DOHERTY: And, Mr. Morris, is

12 this -- Mr. Thomas, this has been sent to

13 you in the chat, right, the entire

14 document, so he could pull it open if he

15 wanted to, or he could print it out if he

16 wanted to? I just wanted to let you know.

17 Virtual depositions are hard.

18 THE WITNESS: I was not aware. Thank

19 you, Casey.

20 BY MR. MORRIS:

21 Q. And again, Mr. Thomas, this is not a

22 memory test. I am not trying to trick you. I

23 really appreciate your counsel's suggestion and

24 observation. If there's anything you need to

25 see to make your answers, you know, more

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1 BH EQUITIES, LLC - D. MILLER

2 A. Again, clarifying a little bit on

3 the -- when the percentages came into play

4 being subject to capital being returned, yes.

5 Q. And by that, just to clarify, you

6 mean that the percentage interests only kicks

7 in after the capital contributions are returned

8 in full, correct?

9 A. Yes, that's what I mean.

10 Q. So for purposes of the waterfall, do

11 I have this right -- and there may be some

12 exceptions to this -- but the money had to get

13 paid back to KeyBank first, right?

14 A. Yes.

15 Q. And then any money that was original

16 capital above and beyond the KeyBank loan would

17 then have to be paid back, right?

18 A. Yes.

19 MR. DOHERTY: Object -- sorry.

20 BY MR. MORRIS

21 Q. And it was only after at least those

22 two events occurred that the remaining value

23 would be distributed in accordance with the

24 percentages under the percentage interest

25 column. Is that fair?



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1 BH EQUITIES, LLC - D. MILLER

2 A. Yes, that was the deal as we

3 understood it.

4 Q. Okay. And is it fair to say that at

5 the time the amended agreement was executed,

6 that BH Equities believed Schedule A accurately

7 reflected the intent of the parties?

8 A. Yes.

9 Q. Again, flip side, before signing the

10 agreement, did BH Equities have any reason to

11 believe that Schedule A did not accurately

12 reflect the intent of the parties?

13 A. No.

14 Q. Prior to signing this agreement, did

15 BH Equities ever hear from anybody acting on

16 behalf of Highland that Highland believed

17 Schedule A was inaccurate in any way?

18 A. Using Highland as the counterparty

19 that we were working with, no, we did not.

20 Q. I'm going to -- I'm going to now ask

21 about each of the component members, because I

22 want to make sure that we're clear here.

23 Prior to the time that BH Equities

24 signed the amended agreement, did anybody

25 acting on behalf of HCRE tell BH Equities that

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1 BH EQUITIES, LLC - D. MILLER

2 A. I'd have to look through the document

3 or search it.

4 BY MR. MORRIS:

5 Q. Okay. So let's go to Section 1.7.

6 Do you see 1.7 is entitled "Company Ownership"?

7 A. Yes, I see that.

8 Q. And am I reading it correctly that

9 the percentages set forth in Section 1.7 match

10 exactly with the percentage interest set forth

11 on Schedule A?

12 A. Yes.

13 Q. And was it, from BH Equities'

14 perspective, the parties' intent that the

15 company ownership percentages set forth in 1.7

16 would match the percentage interests set forth

17 in Schedule A?

18 MR. DOHERTY: Objection. Form.

19 Objection, form. I need to say objection,

20 form. Sorry.

21 BY MR. MORRIS:

22 Q. You can answer.

23 A. It -- I believe it makes sense,

24 without further -- again, I've read the

25 document. I don't recall specifically what 1.7

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1 BH EQUITIES, LLC - D. MILLER

2 they believed Schedule A was wrong in any way?

3 A. I don't know that I can say that

4 affirmatively, as it wasn't -- again, with us

5 it was very much a bilateral. We knew there

6 were two counterparties outside of BH,

7 excluding Liberty, from that discussion. We

8 didn't exactly know the roles clearly as to who

9 was responsible for what parties' interests

10 other than BH's was very clear and there was a

11 related party of Highland, HCRE, as well.

12 Q. All right. Let me ask a different

13 question, then. Prior to the time that

14 BH Equities signed the amended agreement, did

15 anybody acting on behalf of any of the other

16 members of SE Multifamily inform BH Equities

17 that they believed there was an error in

18 Schedule A?

19 A. Not to my knowledge.

20 Q. Thank you. The percentage interests

21 that are reflected in Schedule A were used

22 elsewhere in the amended agreement; is that

23 correct?

24 MR. DOHERTY: Objection. If

25 there's -- objection, form.

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1 BH EQUITIES, LLC - D. MILLER

2 governs, if it governs anything in particular.

3 But as written, the numbers match up, and we

4 didn't have an issue with this specific clause

5 at the time of signing.

6 Q. And this is the clause that

7 specifically identifies what ownership interest

8 each member shall have in SE Multifamily. Am I

9 reading that fairly?

10 A. Yes, with respect -- and I think it

11 has to give deference to the waterfall

12 provisions and distribution provisions later in

13 the agreement.

14 Q. Okay. So subject to the waterfall

15 and distribution provisions, would you agree

16 that Section 1.7 was intended to identify the

17 ownership interest of each of the members of SE

18 Multifamily?

19 A. I believe so, yes.

20 Q. Okay. Can we go to Section 6.1,

21 please? Do you see there's --

22 MR. DOHERTY: John, I could use a

23 break in a few minutes, but I can wait. I

24 just didn't know for a break point if you

25 could take it. But if you want to keep on

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1 BH EQUITIES, LLC - D. MILLER  
2 going, that's fine.  
3 MR. MORRIS: Casey, if you could just  
4 hold on, I've just got two more provisions  
5 and then we'll take a break.  
6 MR. DOHERTY: Sure. No problem. I  
7 just wanted to flag it.  
8 BY MR. MORRIS:  
9 Q. Section 6.1(a), do you see that, sir?  
10 A. Yes, sir.  
11 Q. Okay. And that provision deals with  
12 the distribution of distributable cash as  
13 defined, correct?  
14 A. Yes.  
15 Q. And subject to Article VI and  
16 Article IX, distributable cash is going to be  
17 distributable in the same percentages as the  
18 percentage interests set forth in Schedule A,  
19 correct?  
20 A. Correct.  
21 Q. And that's -- that's what the parties  
22 intended when they wrote this provision and  
23 agreed to it, correct?  
24 A. That's what we agreed to, yes.  
25 MR. MORRIS: Okay. Can we go to

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1 BH EQUITIES, LLC - D. MILLER  
2 back at 12:10?  
3 MR. DOHERTY: We can go off of the  
4 record, too. I'm fine with that. I know  
5 it's getting around -- I'm good on  
6 lunchtime. I don't know how much time, if  
7 you want to talk, John, me and you after,  
8 but I'm fine to come back in five minutes  
9 from break.  
10 MR. MORRIS: Okay. 12:10. Seven  
11 minutes. Thank you.  
12 MR. DOHERTY: Okay.  
13 (Recess taken 11:03 a.m. Central Time  
14 - 11:12 Central Time.)  
15 BY MR. MORRIS:  
16 Q. Let's go back to Schedule A, please.  
17 Mr. Thomas, can you hear me okay?  
18 A. Yes.  
19 Q. Okay. Before signing this amended  
20 agreement, did BH Equities ever raise any  
21 concerns with Highland about HCMLP receiving a  
22 46.06 percentage interest while putting in  
23 capital of \$49,000?  
24 A. I don't recall any specific concerns.  
25 Q. In fact, it was acceptable to

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1 BH EQUITIES, LLC - D. MILLER  
2 Section 9.3, please? All right. So if we  
3 could just go to the top of it.  
4 BY MR. MORRIS:  
5 Q. All right. So this Section 9.3 deals  
6 with liquidation. Do you see that?  
7 A. Yes.  
8 Q. And it -- is it fair to say that  
9 Section 9.3, if we can scroll down just a  
10 little bit, is intended to provide for the  
11 waterfall in a liquidation scenario?  
12 A. Yes.  
13 Q. And is it fair to say that after the  
14 expenses and payments are made in Sections  
15 9.3(a) through (d), that any remaining cash or  
16 assets would be distributed to the members of  
17 SE Multifamily in the same percentage as the  
18 percentage interests set forth on Schedule A?  
19 A. Yes.  
20 Q. And that's what the parties intended  
21 when they signed this agreement, to the best of  
22 BH Equities' understanding, correct?  
23 A. Correct.  
24 MR. MORRIS: Okay. We can take that  
25 break now. It's 12:03. Can we just come

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1 BH EQUITIES, LLC - D. MILLER  
2 BH Equities that Highland Capital Management,  
3 L.P. receive a 46.06 percentage interest in SE  
4 Multifamily in exchange -- withdrawn.  
5 It was acceptable to BH Equities that  
6 Highland Capital Management, L.P. make a  
7 capital contribution of \$49,000 to SE  
8 Multifamily while receiving a 46.06 percentage  
9 interest, correct?  
10 A. I would say we were somewhat  
11 indifferent, as it didn't affect our economics  
12 in -- you know, beyond the 6 percent that we  
13 understood we were getting into.  
14 Q. You agreed to it, correct?  
15 A. Yes.  
16 Q. And you didn't voice any objections  
17 about that, correct?  
18 A. Not to my knowledge.  
19 Q. And you knew that that was part of  
20 the overall deal, correct?  
21 A. Yes.  
22 Q. Before signing this agreement, did  
23 BH Equities have any understanding as to why  
24 Highland Capital Management, L.P. was going to  
25 be a member of SE Multifamily?



<p style="text-align: right;">Page 62</p> <p>1 BH EQUITIES, LLC - D. MILLER</p> <p>2 A. I don't believe we did.</p> <p>3 Q. Did BH Equities ever speak with</p> <p>4 Highland about why HCMLP was participating in</p> <p>5 this transaction?</p> <p>6 A. Not to my knowledge.</p> <p>7 Q. Did BH Equities ever ask Highland why</p> <p>8 HCMLP was obtaining a 46.06 percent interest?</p> <p>9 A. I don't recall that we did.</p> <p>10 Q. So this was -- Schedule A was</p> <p>11 something that BH Equities knew about and</p> <p>12 agreed to at the time it signed this agreement.</p> <p>13 Fair?</p> <p>14 A. Yes.</p> <p>15 Q. Okay. Let's go to Section 6.4(a) on</p> <p>16 page 12, please. Okay. Do you see in Section</p> <p>17 6.4(a), there's a -- well, 6.4 deals with</p> <p>18 allocations of profits and losses.</p> <p>19 Do you see that?</p> <p>20 A. Yes.</p> <p>21 Q. In Section 6.4(a), the parties agreed</p> <p>22 that except as provided in that section, 94</p> <p>23 percent of SE Multifamily's profits and losses</p> <p>24 would be allocated to HCMLP; is that fair?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 63</p> <p>1 BH EQUITIES, LLC - D. MILLER</p> <p>2 Q. Was this allocation the subject of</p> <p>3 any negotiation?</p> <p>4 MR. DOHERTY: Objection, form.</p> <p>5 MR. MORRIS: Withdrawn.</p> <p>6 BY MR. MORRIS:</p> <p>7 Q. Was the allocation of 94 percent to</p> <p>8 6 percent for BH Equities on profits and losses</p> <p>9 the subject of any negotiation?</p> <p>10 A. It was on a phone call between myself</p> <p>11 and Mr. Broaddus, it came up as it, you know,</p> <p>12 wasn't exactly normal. But it was an issue</p> <p>13 that, you know, was kind of internal, so it</p> <p>14 wasn't broadly negotiated past or those things,</p> <p>15 as we were, again, somewhat indifferent.</p> <p>16 Q. And what does it mean that it was not</p> <p>17 exactly normal?</p> <p>18 A. Normally the allocation of profit and</p> <p>19 losses would also follow an allocation -- the</p> <p>20 waterfall allocation or those things more</p> <p>21 closely.</p> <p>22 Q. And did Mr. Broaddus provide any</p> <p>23 explanation as to why Highland wasn't following</p> <p>24 that course that you just described?</p> <p>25 A. Not in any -- not in detail.</p>
<p style="text-align: right;">Page 64</p> <p>1 BH EQUITIES, LLC - D. MILLER</p> <p>2 Q. Did he describe any reason for</p> <p>3 allocating 94 percent of SE Multifamily's</p> <p>4 profits and losses to HCMLP?</p> <p>5 A. No.</p> <p>6 Q. Am I correct that under the terms of</p> <p>7 the amended agreement, none of SE Multifamily's</p> <p>8 profits and losses would be allocated to HCRE,</p> <p>9 correct?</p> <p>10 A. That's correct.</p> <p>11 Q. Did BH Equities ask Highland why none</p> <p>12 of the profits and losses were being allocated</p> <p>13 to HCRE?</p> <p>14 A. I don't believe so.</p> <p>15 Q. Did anybody acting on behalf of any</p> <p>16 of the other members ever discuss with</p> <p>17 BH Equities why HCRE was not being allocated</p> <p>18 any of SE Multifamily's profits or losses?</p> <p>19 A. I don't believe so.</p> <p>20 Q. To the best of -- withdrawn.</p> <p>21 To the best of BH Equities'</p> <p>22 knowledge, does paragraph 6.4(a) accurately</p> <p>23 reflect the parties' intent?</p> <p>24 A. To the best of our knowledge, yes.</p> <p>25 Q. Did anybody acting on behalf of any</p>	<p style="text-align: right;">Page 65</p> <p>1 BH EQUITIES, LLC - D. MILLER</p> <p>2 member to the SEM amended agreement ever inform</p> <p>3 BH Equities that Section 6.4(a) was incorrect</p> <p>4 in any way?</p> <p>5 A. I don't believe so.</p> <p>6 Q. Do you know if the amended agreement</p> <p>7 that we're looking at was ever amended for any</p> <p>8 reason at any time?</p> <p>9 A. There was a slip page at some</p> <p>10 point -- and I believe it was after this --</p> <p>11 just to update capital. But it was a</p> <p>12 nonsubstantial update.</p> <p>13 Q. I think we'll get to that in a few</p> <p>14 minutes.</p> <p>15 Other than the slip page that you</p> <p>16 just described, is BH Equities aware of any</p> <p>17 amendment to the amended agreement as we've</p> <p>18 defined it here today?</p> <p>19 A. No.</p> <p>20 Q. BH Equities never signed an amendment</p> <p>21 to the amended agreement, correct?</p> <p>22 A. Correct.</p> <p>23 Q. And BH Equities was never informed by</p> <p>24 anybody acting on behalf of HCRE or any of the</p> <p>25 other members to the agreement that the amended</p>

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1 BH EQUITIES, LLC - D. MILLER  
2 agreement had been amended, correct?  
3 A. Correct.  
4 Q. Did BH Equities ever receive in  
5 writing any draft agreement to the amended  
6 agreement?  
7 A. I don't believe so.  
8 Q. Did -- after the time that this  
9 agreement was executed, did BH Equities ever  
10 discuss with any member whether this amended  
11 agreement would be further amended?  
12 A. Yes.  
13 Q. Can you describe for me when those  
14 conversations take place or communications took  
15 place?  
16 A. Sure. There was e-mails expressing  
17 our desire to amend our 6 percent amount, right  
18 around the time of signing and a couple of  
19 times thereafter. I don't remember specific  
20 dates.  
21 So, you know, starting in March of --  
22 of '19 and then occasionally thereafter, we  
23 expressed a desire to expand our 6 percent  
24 number.  
25 Q. And what was BH -- what did Highland

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1 BH EQUITIES, LLC - D. MILLER  
2 A. I am not.  
3 Q. Let's -- let's start to look at some  
4 other documents.  
5 (Exhibit 3 marked.)  
6 MR. MORRIS: Let's put up on the  
7 screen what we've marked as Exhibit 3.  
8 And so we're going to go back in time a  
9 little bit to prior to the execution of  
10 the agreement.  
11 BY MR. MORRIS:  
12 Q. And I'm directing your attention to a  
13 document that's been marked, if we could look  
14 at the bottom, Bates stamp BH 92. I'm going to  
15 skip the zeros.  
16 MR. DOHERTY: Mr. Morris, with  
17 e-mails, I always like to, you know, if  
18 possible, have it so I can start reading  
19 from the bottom of the conversation. Will  
20 these be put in the chat as where we're  
21 going?  
22 MR. MORRIS: Oh, yeah, we'll put it  
23 in the chat.  
24 MR. DOHERTY: Okay.  
25 MR. MORRIS: I don't think there's

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1 BH EQUITIES, LLC - D. MILLER  
2 say in response?  
3 A. I believe in the e-mail  
4 correspondence it said something along the  
5 lines of there may be future amendments needed  
6 or something along that line.  
7 Q. But it never happened; is that fair?  
8 A. That is fair.  
9 Q. And is it also fair that any  
10 discussion of any amendment that BH Equities is  
11 aware of would be reflected in the e-mails that  
12 BH Equities produced in response to the  
13 subpoena?  
14 A. Could you reask the question? I just  
15 want to make sure I answer it correctly.  
16 Q. Sure. Are the communications  
17 concerning a possible amendment to the amended  
18 agreement reflected in the e-mails that  
19 BH Equities produced in response to the  
20 subpoena?  
21 A. Yes.  
22 Q. Are you aware of any communications  
23 concerning a possible amendment that are not  
24 reflected in the e-mails that BH Equities  
25 produced in response to the subpoena?

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1 BH EQUITIES, LLC - D. MILLER  
2 anything below what I'm asking about, but  
3 can you scroll --  
4 MS. CANTY: It's in there now.  
5 MR. DOHERTY: These virtual  
6 depositions, I know it's -- you go to the  
7 top, you don't have context. So I just  
8 wanted to -- I'll let you go. Thank you.  
9 BY MR. MORRIS:  
10 Q. So do you see -- if we could just put  
11 this whole e-mail up on the screen right there.  
12 Okay. It's an e-mail from Mr. Roby to Matt  
13 McGraner, do you see that, from October 7,  
14 2018?  
15 A. Yes.  
16 Q. Okay. We talked -- I think you  
17 mentioned or maybe I mentioned Mr. McGraner  
18 earlier. Do you have an understanding as to  
19 whose interest Mr. McGraner was representing in  
20 these communications?  
21 A. We would have viewed them as -- or  
22 Matt as representing kind of the broader -- you  
23 know, again, we viewed it as a bilateral  
24 negotiation, so BH -- and then I'm going to use  
25 air quotes again -- Highland broadly, the other

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1 BH EQUITIES, LLC - D. MILLER

2 two parties. You know, I don't specifically

3 know which of those two parties, but -- that he

4 was representing, the other party to the

5 agreement.

6 Q. Okay. I'm focused on the chart with

7 the sentence above it, but, again, you should

8 read whatever you want of the e-mail for

9 context. My question for you, the first

10 question is, do you know what that chart is in

11 the middle of the page under the word "Cash"?

12 A. Yes.

13 Q. And what's your understanding of what

14 this chart depicts?

15 A. It is depicting the sources of the

16 capitalization for SE Multifamily Holdings.

17 Q. And so is this a proposal that's

18 being made by BH Equities, or is this a summary

19 of discussions that have been taking place, if

20 you know?

21 A. A little of both.

22 Q. Okay. And I see that there's a

23 reference to Highland there on the left. Do

24 you see that? Is that -- do you know what that

25 refers to?

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1 BH EQUITIES, LLC - D. MILLER

2 MR. MORRIS: And if we could scroll

3 up just to see Mr. Broaddus's response.

4 BY MR. MORRIS

5 Q. Mr. Broaddus again was acting on

6 behalf of Highland. Do I have that right?

7 MR. DOHERTY: Objection. I know we

8 have some kind of defined terms for the

9 deposition, but I just want to --

10 objection, form.

11 BY MR. MORRIS:

12 Q. Based on the prior testimony, you can

13 answer, sir.

14 A. He was acting on behalf of what we

15 viewed as the Highland, you know, broad entity.

16 So we didn't know specifically HCMLP or HCRE in

17 particular. But as a counterparty to the

18 broader Highland, you know, ecosystem, yes.

19 Q. Okay. Can you just -- can you just

20 read Mr. Broaddus's e-mail to yourself and tell

21 me when you're finished?

22 A. I've finished.

23 Q. Okay. Do you know if anybody ever

24 told KeyBank that the SE Multifamily, LLC

25 agreement that was in existence at that time

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1 BH EQUITIES, LLC - D. MILLER

2 A. We were kind of lumping -- in this

3 correspondence, we were lumping Highland

4 together as the counterparty to BH in the -- in

5 the agreement and in the transaction.

6 Q. Okay. So this is October 7, 2018,

7 and it's after the closing of the acquisition

8 of the real property by SE Multifamily,

9 correct?

10 A. Correct.

11 Q. Do you know if the numbers reflected

12 on this chart changed between October and the

13 time the deal was consummated in March?

14 A. I believe they were modestly updated,

15 but not in any order of magnitude.

16 MR. MORRIS: Let's go to the next

17 document, we'll mark as Exhibit 4. It has

18 Bates number BH 133 to 44.

19 (Exhibit 4 marked.)

20 BY MR. MORRIS:

21 Q. And if you go to the bottom of the

22 first page, you'll see that Mr. Roby asks

23 Mr. Broaddus for a copy of the SE Multifamily

24 LLC agreement. Do you see that?

25 A. Yes.

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1 BH EQUITIES, LLC - D. MILLER

2 was just a placeholder?

3 A. I don't have knowledge one way or the

4 other.

5 Q. Do you know if anybody told KeyBank

6 that the original LLC agreement was

7 meaningless?

8 A. The same answer. I don't have

9 knowledge one way or the other.

10 Q. Okay. But as of this time,

11 obviously, BH Equities did know that an

12 original LLC agreement existed, right?

13 A. Yes.

14 Q. And that the original agreement was

15 going to be amended to reflect, quote, whatever

16 the deal terms are, closed quote, correct?

17 A. Correct.

18 Q. And, in fact, the original LLC

19 agreement was amended, correct?

20 A. Yes.

21 Q. And that's the agreement we just

22 looked at; is that fair?

23 A. Yes.

24 Q. So is it fair to say that consistent

25 with Mr. Broaddus's November 7th e-mail, the

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1 BH EQUITIES, LLC - D. MILLER  
2 original LLC agreement was amended to, quote,  
3 reflect whatever the deal terms were?  
4 A. I think that's fair.  
5 MR. MORRIS: Let's go to the next  
6 document, Exhibit 5, which has Bates  
7 number BH 1271 to -73.  
8 (Exhibit 5 marked.)  
9 BY MR. MORRIS:  
10 Q. Before I ask you any questions about  
11 this document, the agreement was dated  
12 March 15th, 2019. Do you remember that?  
13 A. Yes.  
14 Q. And was there a sense of urgency to  
15 get the agreement signed by the end of that  
16 particular day?  
17 A. Yes.  
18 Q. Do you have an understanding as to  
19 what the cause of that urgency was?  
20 A. My understanding from the  
21 correspondence of March 15th is the deadline to  
22 either file or extend taxes for pass-through  
23 entities, and that was driving the urgency.  
24 Q. And was the goal to make the  
25 agreement effective as of August 23rd, 2018,

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1 BH EQUITIES, LLC - D. MILLER  
2 bottom is from Mr. Broaddus to you and to  
3 Mr. Roby with a copy to Mr. McGraner, and it's  
4 sent on March 14th. Do you see that?  
5 A. Yes, sir.  
6 Q. And do you recall -- I think you may  
7 have testified to this earlier, but does this  
8 refresh your recollection that BH Equities was  
9 presented with a draft amended LLC agreement  
10 for SE Multifamily on March 14th?  
11 A. Yes.  
12 Q. And do you see in the  
13 next-to-the-last paragraph in Mr. Broaddus'  
14 first e-mail there, he says, quote, the  
15 contribution schedule in the attached needs to  
16 be updated with the actual contribution  
17 numbers. I have an updated version I can send  
18 in a separate e-mail.  
19 Do you see that?  
20 A. Yes.  
21 Q. So were the actual contribution  
22 numbers and the contribution schedule a subject  
23 of discussion between BH Equities and Highland  
24 prior to the execution of the amended  
25 agreement?

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1 BH EQUITIES, LLC - D. MILLER  
2 the date on which the original LLC agreement  
3 was entered into?  
4 A. Yes.  
5 Q. And is it BH Equities' understanding  
6 that in order to make the amended and restated  
7 agreement retroactive to August 23rd, 2018, it  
8 had to be signed by the end of the day on March  
9 15, 2019?  
10 MR. DOHERTY: Objection -- withdraw  
11 my statement.  
12 A. I'm not an expert in that matter, but  
13 that would certainly be the understanding we  
14 were given.  
15 BY MR. MORRIS:  
16 Q. Okay. I appreciate the distinction.  
17 Was BH Equities told by Highland that the  
18 agreement had to be executed on or before March  
19 15th in order for it to be retroactive to  
20 August 2018?  
21 A. Yes. That was the -- what we were  
22 told.  
23 Q. Okay. So let's take a look at the  
24 e-mail that's up on the screen. You'll see  
25 there's actually two e-mails. The one on the

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1 BH EQUITIES, LLC - D. MILLER  
2 A. Yes.  
3 Q. And then you can see the e-mail  
4 above, and Mr. Broaddus follows up and he says,  
5 among other things, quote, "Contribution  
6 schedule attached." Do you see that?  
7 A. Yes.  
8 Q. And if we can scroll to the next  
9 page, the next page actually has Schedule A  
10 attached. If we could scroll down. I don't  
11 know if you can see it in the chat room because  
12 I don't want you to just take my word for it.  
13 But do you recall receiving a Schedule A from  
14 Mr. Broaddus prior to the execution of the  
15 agreement?  
16 A. Yes.  
17 Q. Okay. And is this the schedule that  
18 Highland prepared and delivered to BH Equities  
19 prior to the execution of the amended  
20 agreement?  
21 A. I believe so.  
22 Q. And is it BH Equities' understanding  
23 that somebody acting on behalf of Highland  
24 completed Schedule A before delivering it to  
25 BH Equities?

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1 BH EQUITIES, LLC - D. MILLER

2 A. Yes, that was our understanding.

3 Q. Okay. BH Equities didn't prepare the

4 numbers that are set forth on Schedule A, did

5 it?

6 A. No.

7 Q. That was Highland, correct?

8 A. Correct.

9 Q. And Highland delivered this document

10 to BH Equities the day before the agreement

11 was -- withdrawn. Actually, delivered it to BH

12 Equities on March 15, 2019, correct?

13 A. This particular Schedule A, yes, was

14 delivered on March 15th.

15 Q. And it was delivered as a stand-alone

16 document by itself with nothing else; is that

17 right?

18 A. That's my recollection, based on -- I

19 believe so without, you know, seeing some other

20 sourcing.

21 THE REPORTER: I'm sorry,

22 Mr. Doherty, did you say something?

23 MR. DOHERTY: Objection. Well,

24 objection that -- John, may I make a

25 comment?

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1 BH EQUITIES, LLC - D. MILLER

2 BH Equities has Bates stamped these documents

3 consecutively 1271, 1272, and 1273?

4 A. Yes.

5 Q. And do you see that Mr. Broaddus's

6 e-mail at the very first page shows that

7 there's an attachment?

8 A. Yes.

9 MR. MORRIS: Can we go up to the

10 first page, please?

11 BY MR. MORRIS:

12 Q. And do you see that Mr. Broaddus's

13 first sentence says attached is the

14 contribution schedule, at least in substance?

15 A. Yes.

16 Q. And do you have any reason to believe

17 that the Schedule A that we just looked at is

18 not the contribution schedule that Mr. Broaddus

19 attached to his e-mail on March 15, 2019, at

20 2:02 p.m.?

21 A. No, I do not. I believe that is the

22 schedule.

23 (Exhibit 6 marked.)

24 Q. Okay. So let's go, then, to

25 Exhibit 6, which is a document Bates numbered

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1 BH EQUITIES, LLC - D. MILLER

2 If you need a document to refresh

3 yourself, Dusty, especially if it's on the

4 screen and -- you know, let Mr. Morris

5 know that you want to look at the prior

6 e-mail or, you know, if you're asking

7 to -- I hope that was okay, Mr. Morris.

8 Appreciate it.

9 MR. MORRIS: It's okay. I mean, I'm

10 happy to show him the third page of the

11 document. I just --

12 MR. DOHERTY: I just know Mr. Thomas

13 is a very detailed-oriented man, so I know

14 if he doesn't -- you know, if it's a

15 question like was this the one sent, in

16 case he wants to go back and see that it

17 was attached to the document or he can ask

18 Mr. Morris is this the attachment. But,

19 you know, I just wanted to make that --

20 make that point.

21 MR. MORRIS: All right. First of

22 all, La Asia, can you show Mr. Thomas the

23 third page of the exhibit? It's blank.

24 BY MR. MORRIS

25 Q. And do you see, Mr. Thomas, that

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1 BH EQUITIES, LLC - D. MILLER

2 1363 to -67. Now, this is an e-mail from you,

3 and attached here -- do you see that there is

4 an attachment that's mentioned in the header of

5 your e-mail?

6 A. Yes.

7 Q. And you refer to an attachment in the

8 first sentence of your e-mail. Do you see

9 that?

10 A. Yes.

11 MR. MORRIS: And if we can scroll

12 down.

13 BY MR. MORRIS:

14 Q. Again, you're free to look at

15 whatever you want. I'm looking for the

16 attachment.

17 MR. MORRIS: If we can keep going.

18 Right there.

19 BY MR. MORRIS:

20 Q. Please scroll down and confirm, if

21 you can, that the document that's set forth on

22 page 1366 and 1367 is the attachment to the

23 e-mail that we're looking at that you sent.

24 A. Yeah. And I'm looking to my left

25 because I pulled it up via the chat link. So

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1 BH EQUITIES, LLC - D. MILLER

2 I'm just -- it gives me a bigger screen to view

3 it.

4 Q. Okay. So that's the attachment that

5 you sent, right?

6 A. Yes.

7 Q. And your attachment deals with the

8 very issue that you identified earlier today

9 that you were focused on, and that was the

10 waterfall; is that right?

11 A. Correct.

12 Q. Okay. And in the first sentence when

13 you say that, "Attached is what we proposed in

14 October to try and handle this," this is

15 expressly referring to the waterfall provision,

16 correct?

17 A. Yes.

18 Q. Okay. And you go on to say, "This

19 covers the distribution language in a way that

20 we can get comfortable with, as we need to make

21 sure that if the capital that Highland put in

22 associated with debt is off, that it's not

23 dilutive."

24 Do you see that?

25 A. I do.

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1 BH EQUITIES, LLC - D. MILLER

2 where we were kind of indifferent.

3 Q. And what needs did Mr. Broaddus

4 describe for you?

5 MR. DOHERTY: Objection.

6 MR. MORRIS: Withdrawn.

7 BY MR. MORRIS:

8 Q. Did Mr. Broaddus describe for you the

9 needs that Highland had with respect to the

10 allocation of taxable income and loss?

11 A. Not in any level of detail.

12 Q. So when you said that you believed

13 your provision would meet their needs, how did

14 you believe their provision would meet

15 Highland's needs?

16 A. The provision that we shared was

17 focused more on the distribution of cash and

18 not the allocation of profits and losses.

19 Q. And is that because Section 6.1 deals

20 with the allocation of cash and Section 6.4

21 deals with the allocation of profits and

22 losses?

23 A. Could you show me Section 6.4, just

24 to verify the numbers? But, yes, 6.1 was

25 focused exclusively on the allocation of cash

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1 BH EQUITIES, LLC - D. MILLER

2 Q. What capital that Highland put in

3 associated with debt, what does that refer to?

4 A. The KeyBank facility.

5 Q. And what specifically was your

6 concern about how that was treated?

7 A. Our understanding is it would be a

8 loan to HCRE or, you know, an entity affiliated

9 with, you know, kind of the broad Highland, and

10 would be put in as capital, and that obviously

11 it would have a preference to getting paid off,

12 but that it wouldn't then also keep us from

13 getting our capital back after the KeyBank

14 was -- KeyBank facility was paid off.

15 Q. Okay. And then you go on to say

16 later in the paragraph, "We think the

17 attachment does that while still allocating the

18 taxable income loss in a way that meets your

19 needs by percentage."

20 Do you see that?

21 A. Yes.

22 Q. What did you mean by that?

23 A. I had had a brief phone call with

24 Mr. Broaddus, and that was in that -- in

25 relation to the profit and loss allocation

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1 BH EQUITIES, LLC - D. MILLER

2 or the distribution of cash and that a

3 different section, presumably 6.4, would focus

4 on the allocation of profits and losses,

5 separate and distinct from cash.

6 Q. Okay. And I apologize for asking it

7 again, but help me to understand how the

8 attached -- oh, is it because your attached

9 proposal doesn't impact the allocation of

10 taxable income and losses at all?

11 A. Correct.

12 Q. Ah, okay. So I understand. So -- so

13 you're trying to explain -- is it fair to say

14 that you're trying to explain to Mr. Broaddus

15 that your concern is the distribution waterfall

16 but that he can leave the tax allocation the

17 way they wanted it?

18 A. Yes, yes.

19 Q. Okay. Do you recall -- actually,

20 towards the end it says, "The capital in this

21 agreement would only be the capital that

22 Highland put in that is not also incorporated

23 in the bridge loan agreements. I think that is

24 plus or minus \$40 million based on my

25 understanding."



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1 BH EQUITIES, LLC - D. MILLER  
2 Is what you're saying there that  
3 Highland was going to put in approximately --  
4 withdrawn.  
5 Is what you're saying there that  
6 Highland was going to get credit for having put  
7 in \$290 million or thereabouts into SE  
8 Multifamily, 250 million of which was coming  
9 from the KeyBank loan and the other 40 million  
10 of which was coming from Highland?  
11 A. Yes, that's the distinction I was  
12 trying to make.  
13 Q. Okay. And under the waterfall is it  
14 BH Equities' understanding that it agreed that  
15 the \$250 million that had been borrowed from  
16 KeyBank would be paid back first?  
17 A. Yes.  
18 Q. Before return of capital?  
19 A. Yes.  
20 Q. Does BH Equities know the source of  
21 funding for the other \$40 million?  
22 A. No, not at this time.  
23 Q. Did BH Equities ever ask Highland  
24 where the \$40 million was coming from?  
25 A. No, not that I -- not that I'm aware.

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1 BH EQUITIES, LLC - D. MILLER  
2 partnerships with Highland broadly, you know,  
3 whether that be HCRE, HCMLP, the NexPoint RE,  
4 et cetera, to the tune of 40-plus property  
5 partnerships, et cetera. So we had significant  
6 relations with them and still do on the  
7 management company side. So I don't  
8 specifically know what entities were owned or  
9 related to what, but we had significant prior  
10 experience with the parties involved.  
11 Q. And were -- were Mr. McGraner or  
12 Mr. Broaddus or Mr. Chang involved in any of  
13 those other deals?  
14 A. Yes.  
15 Q. Were they the primary contacts that  
16 BH Equities had for the transactions that  
17 BH Equities did with Highland and its  
18 affiliated and related entities?  
19 A. I believe so, yes.  
20 (Exhibit 7 marked.)  
21 Q. Let's go to Exhibit 7, please, which  
22 is a two-page e-mail with Bates number 1437 to  
23 -38. And if we could start at the bottom,  
24 you'll see -- this is the e-mail that we just  
25 looked at from you, right?

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1 BH EQUITIES, LLC - D. MILLER  
2 Q. Does BH Equities know when HCRE was  
3 formed?  
4 A. I don't believe so. We may have an  
5 organizational doc or something that was  
6 provided as part of a deal that was shared with  
7 a lender, et cetera, but not in the ordinary  
8 course would we know that.  
9 Q. Had BH Equities done business with  
10 HCRE prior to Project Unicorn?  
11 A. I don't know for sure. In our  
12 business generally there are a lot of  
13 subsidiaries and things like that that are  
14 formed for specific deals. So it's quite  
15 possible that HCRE could have been an upper  
16 entity that owned a subsidiary, et cetera. But  
17 I just don't know the waterfalls cold -- or the  
18 organizational charts cold to know if we did or  
19 did not specifically with HCRE.  
20 Q. Okay. That's fair.  
21 Had BH Equities done business with  
22 HCMLP or any entity that BH Equities believed  
23 was related or affiliated with HCMLP prior to  
24 Project Unicorn?  
25 A. We had numerous projects and

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1 BH EQUITIES, LLC - D. MILLER  
2 A. Yep.  
3 Q. It's the exact same e-mail?  
4 A. Yes.  
5 Q. And then if we scroll a little higher  
6 on the page, you'll see that it appears that  
7 Mr. Broaddus, the person to whom you sent it,  
8 forwarded it to Mr. Chang. Do you see that?  
9 A. Yes.  
10 Q. And then if we can keep scrolling up,  
11 Mr. Chang sent an e-mail back to Mr. Broaddus.  
12 Do you see that?  
13 A. Yes.  
14 Q. And then Mr. Broaddus forwarded  
15 that -- Mr. Chang's e-mail to you. Is that  
16 fair?  
17 A. Yes.  
18 Q. And Mr. Chang's e-mail was a direct  
19 response to the proposal that was attached to  
20 the e-mail that we just looked at that was  
21 marked as Exhibit 6, right?  
22 A. Yes.  
23 Q. And what's in Mr. Chang's e-mail is a  
24 different provision for the waterfall. Fair?  
25 A. Yes.



<p style="text-align: right;">Page 90</p> <p>1 BH EQUITIES, LLC - D. MILLER</p> <p>2 MR. DOHERTY: Objection. Could I see</p> <p>3 the -- could we zoom out so I can see that</p> <p>4 whole e-mail? Do y'all mind?</p> <p>5 MR. MORRIS: Sure. Yep.</p> <p>6 MR. DOHERTY: Okay. Not really an</p> <p>7 objection but a request .</p> <p>8 I think There's an (e). And maybe</p> <p>9 it's not. Could you scroll down just so I</p> <p>10 can see the (e)?</p> <p>11 MR. MORRIS: It's at the bottom of</p> <p>12 the page there.</p> <p>13 MR. DOHERTY: I'm sorry to be</p> <p>14 annoying. I just wanted to see it. While</p> <p>15 we were talking about it, I didn't know if</p> <p>16 we could zoom out so we could have the</p> <p>17 whole --</p> <p>18 THE WITNESS: Yeah, I can see it. I</p> <p>19 can see the provision (e), Casey.</p> <p>20 MR. DOHERTY: Okay. Then I'm okay.</p> <p>21 I was more talking for you, Dusty. I</p> <p>22 wanted everybody to be able to see the</p> <p>23 document. Okay. Sounds good.</p> <p>24 BY MR. MORRIS:</p> <p>25 Q. Just let me try to clean this up a</p>	<p style="text-align: right;">Page 91</p> <p>1 BH EQUITIES, LLC - D. MILLER</p> <p>2 bit, Mr. Thomas.</p> <p>3 Is it your understanding that</p> <p>4 Mr. Chang's e-mail was effectively a</p> <p>5 counterproposal to the one that you had made</p> <p>6 earlier in the day on March 15th with respect</p> <p>7 to the waterfall?</p> <p>8 A. Yes. That's how we interpreted it.</p> <p>9 Q. Okay. And is it your</p> <p>10 understanding -- withdrawn.</p> <p>11 Is it BH Equities' understanding that</p> <p>12 this provision in Mr. Chang's e-mail was a</p> <p>13 provision that was drafted by Highland?</p> <p>14 A. Yeah, Highland is kind of the broad</p> <p>15 counterparty perspective, yes.</p> <p>16 Q. Okay. And, Mr. Chang's -- withdrawn.</p> <p>17 Other than the fact that it's labeled</p> <p>18 1.1 instead of 6.1, are you aware that</p> <p>19 Mr. Chang's e-mail is -- was adopted verbatim</p> <p>20 in the executed amended agreement?</p> <p>21 MR. DOHERTY: Objection.</p> <p>22 A. I would compare, but, yeah, I believe</p> <p>23 it is -- it looks to be the language, the final</p> <p>24 language.</p> <p>25</p>
<p style="text-align: right;">Page 92</p> <p>1 BH EQUITIES, LLC - D. MILLER</p> <p>2 BY MR. MORRIS:</p> <p>3 Q. And did Mr. Chang's section -- and</p> <p>4 what's on Mr. Chang's e-mail, is it your</p> <p>5 understanding that it ultimately became Section</p> <p>6 6.1 of the amended agreement? And, again, I'm</p> <p>7 happy to pull it up if you'd like because I</p> <p>8 don't mean to test you.</p> <p>9 A. Yeah, if you wouldn't mind pulling it</p> <p>10 up, that would be great.</p> <p>11 Q. Let's do that. Let's pull it up.</p> <p>12 It's Exhibit 2. If we can pull up 6.1.</p> <p>13 MR. DOHERTY: Mr. Morris, do you</p> <p>14 think it would be helpful for Mr. Thomas</p> <p>15 to print out the amended agreement during</p> <p>16 this series of questions, or is this kind</p> <p>17 of a one-off question?</p> <p>18 MR. MORRIS: I think it's a one-off</p> <p>19 question.</p> <p>20 MR. DOHERTY: Okay.</p> <p>21 MR. MORRIS: But if he wants to do</p> <p>22 that, I don't mean to stop him.</p> <p>23 MR. DOHERTY: I understand.</p> <p>24 BY MR. MORRIS:</p> <p>25 Q. Here's 6.1. You'll see that it's got</p>	<p style="text-align: right;">Page 93</p> <p>1 BH EQUITIES, LLC - D. MILLER</p> <p>2 five Sections, (a) through (e)?</p> <p>3 A. Yep.</p> <p>4 Q. You'll see that -- if we can go back</p> <p>5 up to (a). You've got the percentages that are</p> <p>6 set forth in Schedule A, 47.94 percent to HCRE,</p> <p>7 46.06 percent to HCMLP, and 6 percent to BH.</p> <p>8 Do you see that?</p> <p>9 A. Yes.</p> <p>10 Q. Okay. And then if we scroll down to</p> <p>11 (e), it basically says, notwithstanding</p> <p>12 everything that came before it, the first</p> <p>13 amounts of distributable cash shall be deemed</p> <p>14 distributed to each member in proportion to</p> <p>15 amounts borrowed on behalf of SE Multifamily.</p> <p>16 Is that a fair characterization?</p> <p>17 A. Borrowed and then invested as equity</p> <p>18 into the deal, yes.</p> <p>19 Q. That's right. So that's the pay</p> <p>20 KeyBank back first provision. Fair?</p> <p>21 A. Yes.</p> <p>22 Q. And then little (ii) there says that</p> <p>23 after that's done, it's pro rata in proportion</p> <p>24 to the members' respective capital accounts.</p> <p>25 Do you see that?</p>

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1 BH EQUITIES, LLC - D. MILLER

2 A. Yes.

3 Q. That's the return of capital

4 provision, correct?

5 A. Correct.

6 Q. And that's what BH Equities was

7 concerned about, correct?

8 A. Correct.

9 Q. And so Mr. Chang's proposal was

10 acceptable to BH Equities, correct?

11 A. Yes.

12 Q. BH Equities accepted Mr. Chang's

13 entire proposal with respect to Section 6.1,

14 correct?

15 A. Correct.

16 Q. Okay.

17 MR. MORRIS: All right. If we can go

18 to the next exhibit, Number 8, Bates

19 number 1140.

20 (Exhibit 8 marked.)

21 BY MR. MORRIS:

22 Q. Okay. So we're still on the 15th.

23 This was a busy day for you. At least it looks

24 that way. It's now 11:20 at night.

25 A. Uh-huh.

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1 BH EQUITIES, LLC - D. MILLER

2 A. That would be appreciated.

3 Q. Yep. Okay. So you'll see that at

4 9:24, you know, some version of the agreement,

5 Mr. Roby sent it to himself. Do you see that

6 at 9:24?

7 A. Yes. Yes, sorry.

8 Q. And if we can scroll up just a bit.

9 It looks like -- it's not clear to whom

10 Mr. Roby sent it to, but at 9:28, he had a

11 signed agreement at that time. And he asked

12 about working on a promote structure by the end

13 of April. Do you see that?

14 A. Uh-huh. Yes.

15 Q. So do you recall that there were two

16 different versions of the agreement that were

17 signed, or is that the slip page that you were

18 referring to earlier?

19 A. I don't recall exactly --

20 Q. Okay.

21 A. -- where version control was at that

22 point.

23 Q. Okay. So somebody responds, "Thanks,

24 Ben." It's hard to tell.

25 MR. MORRIS: But keep scrolling up.

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1 BH EQUITIES, LLC - D. MILLER

2 Q. And Mr. Broaddus sends to you and to

3 Mr. Roby, and he copies his colleagues, and he

4 attaches the agreement with the change, quote,

5 Dusty and I discussed, closed quote, and the

6 document was ready for execution. Do you see

7 that?

8 A. Yes.

9 Q. Is the change that you and

10 Mr. Broaddus discussed the change to 6.1 that

11 we just looked at in the two e-mails?

12 A. Yes.

13 Q. Okay. So that Mr. Broaddus is

14 informing BH Equities that after negotiating

15 Section 6.1 to the satisfaction of all members,

16 they were ready to sign; is that fair?

17 A. Yes.

18 Q. Okay.

19 (Exhibit 9 marked.)

20 MR. MORRIS: All right. Let's go to

21 the next exhibit, please. It's an e-mail

22 string with Bates number 277 to 282.

23 BY MR. MORRIS:

24 Q. And we can start at the bottom so

25 there's no confusion here.

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1 BH EQUITIES, LLC - D. MILLER

2 BY MR. MORRIS:

3 Q. Oh, I guess Mr. Broaddus did. He

4 says, "Thank you, Ben."

5 MR. MORRIS: Keep scrolling up.

6 BY MR. MORRIS:

7 Q. At 9:45, Mr. Chang sends what he says

8 is a fully executed agreement. Do you see

9 that?

10 A. Yes.

11 MR. MORRIS: Keep scrolling up.

12 BY MR. MORRIS:

13 Q. Okay. So a few days later, you sent

14 an e-mail to Mr. Chang and to Mr. Broaddus

15 where you noted a small issue in the agreement.

16 Do I have that correct?

17 A. Correct.

18 Q. Can you describe for me what that

19 small issue was?

20 A. I believe it was just the amount of

21 capital -- exact amount of capital contribution

22 was off slightly.

23 Q. And the piece that was off slightly

24 was the capital contribution amount set forth

25 in Schedule A for BH Equities; is that right?

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1 BH EQUITIES, LLC - D. MILLER

2 A. Yes, that's my understanding.

3 Q. And so you or somebody acting on

4 behalf of BH Equities was looking at Schedule A

5 and noticed that the capital contribution

6 amount was off by a little bit; is that fair?

7 A. Yes.

8 Q. Okay. And you brought that to

9 Highland's attention, correct?

10 A. Correct.

11 Q. But BH Equities didn't identify

12 anything else about Schedule A that appeared to

13 be in error or by mistake at that time,

14 correct?

15 A. Correct.

16 Q. And let's -- let's just look to see.

17 So you identify the error, and then you say,

18 "As I understand it, several other items

19 related to the agreement will get discussed and

20 an amendment will be coming. Can we make that

21 update at the time of the amendment?"

22 Right? So it was BH Equities'

23 expectation that there would be an amendment;

24 is that right?

25 A. Yes.

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1 BH EQUITIES, LLC - D. MILLER

2 BY MR. MORRIS:

3 Q. You can answer.

4 A. The only issue that I was aware of.

5 Again, I'm focused more on the economics,

6 though.

7 Q. Okay. Not -- there is no other

8 provision of the amended agreement that BH

9 Equities ever asked Highland to change except

10 for that number 6. Fair?

11 A. That's my understanding.

12 Q. So let's see what Mr. Broaddus says

13 in response. Okay. Right there. And he

14 suggests the slip page. Do you see that?

15 A. Yes.

16 Q. And he asks a question of Kim and

17 Matt at the bottom about whether the increase

18 in BH Equities' capital contribution would

19 change Highland's contribution or would it be

20 just additional capital to BH only. Do you see

21 that?

22 A. Yes.

23 Q. And the answer to that question was

24 that it was only going to change the capital

25 contribution made by BH Equities, correct?

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1 BH EQUITIES, LLC - D. MILLER

2 Q. And that amendment that BH Equities

3 was hoping to have made was specifically

4 limited to the question of whether the

5 6 percent residual interest would be increased;

6 is that right?

7 A. Yes.

8 Q. Okay. And is that -- was the promote

9 an attempt to get value through another means,

10 or is that related to the desire to get the

11 6 percent increase?

12 A. They were one and the same.

13 Q. Oh, okay. So -- so the amendment

14 that -- this is what you were referring to

15 earlier, right, that BH Equities agreed to

16 accept the 6 percent residual interest with the

17 hope and expectation that there would be an

18 amendment that would increase that amount,

19 right?

20 A. Right.

21 Q. And that's the only issue that BH

22 Equities wanted changed in the amended

23 agreement, correct?

24 MR. DOHERTY: Objection.

25

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1 BH EQUITIES, LLC - D. MILLER

2 A. I believe so, yes.

3 Q. BH Equities wasn't intending to

4 change the capital contribution of any of the

5 Highland parties, correct?

6 A. No.

7 Q. And then -- and then Mr. Chang

8 weighed in in response and said that, you know,

9 quote, we are fine handling this with a slip

10 page if BH Equities, closed quote, is fine with

11 that. Do you see that?

12 A. Yes.

13 Q. And then Mr. Broaddus responds to

14 that and says that Highland would leave it up

15 to BH Equities because, as he understood it,

16 "we do plan to amend anyways; however, if you

17 want it slip paged in the meantime, we can do

18 that."

19 Have I read that correctly?

20 A. Yes.

21 Q. But no amendment was ever executed,

22 correct?

23 A. Correct.

24 Q. No agreement was ever reached on a

25 modification of any kind to BH Equities'

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1 BH EQUITIES, LLC - D. MILLER

2 residual interest in SE Multifamily, correct?

3 A. Correct.

4 Q. Do you know if a slip page was ever

5 inserted into the agreement to make the small

6 change that BH Equities identified to its

7 capital contribution?

8 A. I believe it was.

9 Q. So Highland was responsive to

10 BH Equities' request that Schedule A be changed

11 to accurately reflect BH Equities' capital

12 contribution; is that fair?

13 A. Yes.

14 Q. Did Highland ever ask BH Equities to

15 make any change to Schedule A at any time after

16 the agreement was executed on March 15, 2019?

17 A. There was correspondence as KeyBank

18 was paid back in that process and as other

19 assets were sold to get -- get things right as,

20 you know, contributions were paid back along

21 the way. So there was back-and-forth

22 correspondence. I don't know if it was

23 specific to update Schedule A, per se, but

24 there were iterative communications ensuring

25 that the capital that was put in was the

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1 BH EQUITIES, LLC - D. MILLER

2 A. It is.

3 Q. And is this again pointing out that

4 \$250 million of tranche B was considered

5 contributable capital by HCRE?

6 A. Yes.

7 Q. And by August of 2020, that \$250

8 million had been paid back; is that right?

9 A. Yes, that's my understanding.

10 Q. So that approximately \$39 million of

11 original capital that was credited to HCRE had

12 yet to be returned; is that right?

13 A. Yes, that's my understanding at that

14 time.

15 Q. Okay. And do you recall that in the

16 fall of 2020, there were discussions about the

17 return of capital?

18 A. Yeah. In that rough time frame, yes.

19 MR. MORRIS: Okay. Let's go to the

20 next exhibit, 482 through 485.

21 MR. DOHERTY: Mr. Morris, is it -- I

22 just wanted to ask about another break or

23 lunch break. I don't know, it's your

24 presentation, your deposition. I know

25 it's around noon. It's been an hour.

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2 capital that was paid back, et cetera.

3 Q. Okay. So -- so is it fair to say,

4 then, that Highland never asked BH Equities to

5 amend Schedule A, but there were discussions

6 about distributions and cash flow?

7 A. Yes.

8 MR. MORRIS: Okay. Let's go to the

9 next document, which is Exhibit 10. It's

10 Bates number 716.

11 (Exhibit 10 marked.)

12 BY MR. MORRIS:

13 Q. Have you seen this e-mail before,

14 sir?

15 A. Yeah, I believe it was part of our

16 discovery process.

17 Q. Okay. And do you see -- this is an

18 e-mail from Mr. Mulcahy of BH Management. Do I

19 have that right?

20 A. Yes.

21 Q. Okay. And do you see he refers to

22 tranche B debt?

23 A. Yes.

24 Q. That's a reference to the KeyBank

25 loan, correct?

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1 BH EQUITIES, LLC - D. MILLER

2 MR. MORRIS: I'm happy to take a

3 short break, but after that break, my goal

4 would be to take it to the finish line

5 because I don't think that I'll have a

6 whole lot more.

7 MR. DOHERTY: I can defer to -- do

8 you know how much -- the goal there --

9 MR. MORRIS: It will be another half

10 hour to an hour. So if you want to take a

11 short break, I'm happy to do that.

12 MR. DOHERTY: I could use a little --

13 I think -- do you want to do it now, or do

14 you want to go through a couple more?

15 MR. MORRIS: No, I think now is fine.

16 It's 1:07 here in New York. Let's just

17 come back at 1:15 and I'll, you know, try

18 to finish up within an hour.

19 MR. DOHERTY: Okay. 1:15 Central

20 Time, right?

21 MR. MORRIS: No. I don't want to

22 take a lunch break. I want to take --

23 MR. DOHERTY: Oh, no lunch break.

24 Okay.

25 MR. MORRIS: No.

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1 BH EQUITIES, LLC - D. MILLER

2 MR. DOHERTY: I just got a call from

3 my -- a personal call. I wanted to be

4 able to call it back. I can jump back on.

5 MR. MORRIS: You go take that --

6 Let's go off the record, please.

7 MR. DOHERTY: Yeah, sorry, off the

8 record.

9 (Recess taken 12:07 p.m. Central Time

10 - 12:17 p.m. Central Time.)

11 BY MR. MORRIS:

12 Q. So we're at Exhibit 11, Bates number

13 482 to 485. You know what, I'm going to

14 withdraw this exhibit. So just leave a blank

15 in the transcript -- yeah, just leave a blank

16 simply because it's redundant.

17 Let's shift topics, because I've only

18 got a little bit left here, to the topic of

19 distributions, Mr. Thomas. Do you recall that

20 that's one of the 30(b)(6) topics that we had

21 written about?

22 A. Yes.

23 Q. Okay. And I think we just confirmed

24 that in the fall of 2020, there were

25 discussions between Highland and BH Equities

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1 BH EQUITIES, LLC - D. MILLER

2 that?

3 A. She's the CFO of BH Companies.

4 Q. And was there discussions within BH

5 prior to November 7th concerning BH's desire to

6 have its capital returned?

7 A. Yes.

8 Q. And did BH Equities express that to

9 Highland in or before November 2020?

10 A. I don't know the first time it would

11 have been expressed, but, you know, it

12 wasn't -- it was a fairly known fact that we

13 would like to get our capital back.

14 Q. Okay. And the subject of this

15 e-mail, indeed, is called, quote, Unicorn

16 proposed distribution and detail schedules. Do

17 you see that?

18 A. Yes.

19 Q. Okay. And in the second paragraph,

20 Mr. Mulcahy references requested detail as well

21 as a, quote, updated distribution calculation.

22 Do you see that?

23 A. Yes.

24 Q. Do you have an understanding of what

25 a distribution calculation is?

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2 concerning the return of capital. Do you

3 remember that?

4 A. Yes.

5 Q. Okay.

6 (Exhibit 12 marked.)

7 MR. MORRIS: So let's put up what's

8 been marked as Exhibit 12, which is a

9 document with Bates number BH 192 to -94.

10 And if we could start at the bottom.

11 BY MR. MORRIS:

12 Q. Okay. Do you see that Mr. Mulcahy

13 sent an e-mail on Saturday, November 7th to

14 Bonner McDermott and Paul Broadus with copies

15 to you and Phyllis Jones?

16 A. Yes.

17 Q. I don't think we've seen

18 Mr. McDermott's name before. Do you know who

19 Mr. McDermott is?

20 A. I don't know his exact title, but he

21 has been a correspondent with various

22 properties that we've worked with the Highland

23 entities before, kind of in an acquisition and

24 somewhat asset management type role.

25 Q. And how about Ms. Jones? Who is

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1 BH EQUITIES, LLC - D. MILLER

2 A. Yes.

3 Q. What's your understanding of that

4 term?

5 A. Just the -- the split of the next

6 dollars going out, who is going to get what

7 from -- from the next amount that would be

8 distributed.

9 Q. And did BH Equities maintain a

10 distribution calculation that it updated from

11 time to time as circumstances changed?

12 A. Yeah, based on our understanding of

13 the agreements, we did.

14 Q. And did Highland ask BH Equities to

15 do that, or is that something that BH Equities

16 just did of its own accord?

17 A. I believe we did it on our own

18 accord.

19 Q. And did BH Equities share their

20 distribution calculations with Highland from

21 time to time?

22 A. Yes.

23 Q. And, in fact, it wasn't attached to

24 this particular document, but Mr. Mulcahy wrote

25 to Highland on November 7th that he was

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1 BH EQUITIES, LLC - D. MILLER

2 attaching an updated distribution calculation.

3 Have I read that fairly?

4 A. Yes.

5 Q. And do you see that the updated

6 distribution calculation was for BH, HCRE, and

7 HCM?

8 A. I'd need to see the document, but

9 that would be in line with what I understand

10 from that document.

11 Q. Okay. And it's your understanding

12 that BH refers to BH Equities, correct?

13 A. Yes.

14 Q. And HCRE refers to HCRE Partners,

15 LLC, correct?

16 A. Yes.

17 Q. And HCM refers to Highland Capital

18 Management, L.P., correct?

19 A. Yes.

20 Q. And was it BH Equities' intention to

21 create a distribution calculation that was

22 consistent with the terms and provisions of the

23 amended agreement?

24 A. As we understood them, yes.

25 Q. Okay. And as BH Equities understood

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2 responded the following Tuesday to that e-mail,

3 and he added Matt McGraner and DC Sauter to the

4 thread. Do you see that?

5 A. Yes.

6 Q. Do you know who Mr. Sauter is?

7 A. Yes.

8 Q. Who is Mr. Sauter?

9 A. He is legal counsel within NexPoint,

10 HCRE, those entities.

11 Q. Had BH Equities dealt with Mr. Sauter

12 on Project Unicorn before November 2020?

13 A. Yes. I don't know -- at one point he

14 was with Wick Phillips as well. And I don't

15 know exactly when he made his transition, but

16 he was involved either as outside counsel or

17 internal, you know, several times throughout

18 the deal.

19 Q. Okay. And Mr. McDermett told

20 Mr. Mulcahy and the others copied on the

21 e-mail, including yourself, that he presented

22 BH Equities' proposed distribution and set of

23 facts to Mr. McGraner and Mr. Sauter, correct?

24 A. Yes.

25 Q. Okay. And a couple of days later, BH

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1 BH EQUITIES, LLC - D. MILLER

2 the terms and provisions of the amended

3 agreement on or around November 7th, it

4 prepared a distribution calculation that showed

5 the return of capital to each of the three

6 members of SE Multifamily, correct?

7 A. I -- I'd prefer to see the document

8 to state in the affirmative on that, but that

9 would be in line with, you know, my

10 understanding.

11 Q. And it's in line with what

12 Mr. Mulcahy wrote, correct?

13 A. Yes.

14 Q. There's no question in BH Equities'

15 mind that Mr. Mulcahy told Highland on

16 November 7, 2020 that it had an updated

17 distribution calculation for BH Equities, HCRE,

18 and HCMLP. Fair?

19 A. Yes.

20 Q. Okay.

21 MR. MORRIS: Let's -- let's go up to

22 the response to that, if we could scroll

23 up.

24 BY MR. MORRIS:

25 Q. And you'll see that Mr. McDermett

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1 BH EQUITIES, LLC - D. MILLER

2 Equities hadn't received a response, so

3 Mr. Mulcahy followed up, is that fair, on

4 November 12th, in the e-mail above, if we can

5 scroll up?

6 A. Yes, I see that.

7 Q. Okay. Okay. Let's see what the

8 response to that is. All right. I'm just

9 going to read the paragraph out loud, and then

10 I'm going to ask you some questions about it.

11 "On November 19th, 2020, Mr. McDermett told

12 you, Mr. Mulcahy, and Ms. Jones, among others,

13 quote, we have confirmed internally that we are

14 standing by our position that distributions may

15 be returned to BH and HCRE in order to

16 extinguish their debts. But the HCMLP

17 bankruptcy is temporarily inhibiting our

18 ability to distribute a return of equity at

19 this time. DC Sauter and our team are working

20 toward a solution there and we will get back to

21 you as soon as we have clearance to move

22 forward with additional distributions (return

23 of equity and profits)."

24 Have I quoted that correctly?

25 A. Yes.



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2 Q. Okay. Let's just take this in

3 pieces. At this moment in time, BH Equities

4 wanted their capital back, right?

5 A. Correct.

6 Q. And Highland was refusing to do that,

7 correct?

8 A. In whole, yes.

9 Q. Okay. And their position was that,

10 quote, distributions may be returned to B&H and

11 HCRE in order to extinguish their debts. Do

12 you see that?

13 A. Yes.

14 Q. Do you have an understanding as to

15 what debts are being referred to there?

16 A. I do.

17 Q. What debts are being referred to?

18 A. BH is part of our \$21 million --

19 \$21.2 or \$21.5 million. Had a \$15 million line

20 of credit or debt facility that was drawn to

21 make that investment, and I believe HCRE, it

22 was determined that the entirety of its, you

23 know, 39 or \$40 million amount was also

24 borrowed from NexVest Bank and that that's what

25 we were -- what extinguished their debts is

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2 that only amounts sufficient to repay

3 third-party debt would be permitted, correct?

4 A. Correct.

5 Q. Okay. And then the next sentence

6 says, "But the HCMLP bankruptcy is temporarily

7 inhibiting our ability to distribute a return

8 of equity at this time."

9 Do you see that?

10 A. Yes.

11 Q. Do you know what they meant by that?

12 A. No. Not -- we were not in the weeds,

13 so to speak, on that.

14 Q. Did BH Equities ever ask Highland or

15 anybody acting on behalf of HCRE why the HCMLP

16 bankruptcy would inhibit HCRE's ability to

17 distribute a return of equity in November 2020?

18 A. I don't know that we asked that

19 directly. We knew it was a tricky situation

20 and were somewhat deferential to it.

21 Q. When did BH Equities learn that

22 Highland was in bankruptcy?

23 A. I don't know a specific date, but it

24 would have been, you know, shortly after the

25 filing, as it started to make the public

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2 referring to.

3 Q. All right. Let me make sure that I

4 understand that. 15 of the \$21 million that

5 BH Equities put into the deal was borrowed from

6 a third party. Do I have that right?

7 A. That is correct.

8 Q. And BH Equities' understanding is

9 that the difference between HCRE's capital

10 contribution of approximately \$290 million and

11 the \$250 million that was borrowed from KeyBank

12 was also borrowed from a third party, that \$40

13 million. Do I have that right?

14 A. That's our understanding during this

15 time frame.

16 Q. And it was BH Equities' understanding

17 that Highland's position was that it would

18 permit the repayment of amounts sufficient to

19 allow BH and HCRE to repay in full the

20 third-party debt but nothing more; is that

21 right?

22 A. Yes.

23 Q. All right. So you're in November

24 2020, BH wants its entire initial capital

25 contribution returned, and they're told by HCRE

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2 rounds.

3 Q. And how did BH Equities learn of

4 that? Did they learn it from public

5 information, or did they learn it from anybody

6 acting on behalf of HCRE?

7 A. I don't recall specifically if we

8 were given a heads-up directly from HCRE or our

9 first knowledge was public information.

10 Q. You don't have a recollection of

11 anybody on behalf of HCRE specifically

12 informing BH Equities that HCMLP would be

13 filing for bankruptcy, do you?

14 MR. DOHERTY: Objection, form.

15 BY MR. MORRIS:

16 Q. You can go ahead.

17 A. I don't. And in my preparation, I

18 was not made aware of any contact. That

19 doesn't mean it didn't happen and I just wasn't

20 able to gather that info.

21 Q. I'll represent to you that HCMLP

22 filed for bankruptcy in October 2019. So my

23 question is whether BH Equities had any

24 communications with HCRE at any time prior to

25 November 2020 concerning any impact that the



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1 BH EQUITIES, LLC - D. MILLER  
2 bankruptcy filing would have on HCRE's ability  
3 to make distributions in accordance with the  
4 amended agreement.  
5 A. I don't know of anything that  
6 specific. We were very focused at the time on  
7 continuing the process to get KeyBank paid off  
8 and then kind of taking it stride by stride,  
9 given the complication of this very complex  
10 transaction.  
11 Q. Okay. Had anybody acting on behalf  
12 of HCRE informed anybody acting on behalf of  
13 BH Equities prior to November 19th, 2020 that  
14 the HCMLP bankruptcy would have any impact at  
15 all on the ability to make distributions?  
16 MR. DOHERTY: Objection, form.  
17 A. Could you repeat the question?  
18 BY MR. MORRIS:  
19 Q. Sure. BH Equities is being told in  
20 this e-mail that, quote, the HCMLP bankruptcy  
21 is temporarily inhibiting our ability to  
22 distribute a return of equity at this time.  
23 Do you see that?  
24 A. Yes.  
25 Q. Had anybody acting on behalf of HCRE

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1 BH EQUITIES, LLC - D. MILLER  
2 BY MR. MORRIS:  
3 Q. Okay. And then in the next sentence  
4 it says that DC Sauter and our team are working  
5 toward a solution.  
6 Do you see that?  
7 A. Yes.  
8 Q. Did they ever explain -- did anybody  
9 acting on behalf of HCRE ever explain to  
10 BH Equities what the solution was?  
11 A. No. Not to my knowledge.  
12 Q. Did BH Equities ever ask Highland or  
13 HCRE what the solution was that Mr. Sauter was  
14 working towards?  
15 A. I don't know if we had a specific  
16 question or conversation about that within the  
17 firm.  
18 Q. So if we scroll up, you'll see that  
19 Mr. McDermott, I guess, re-sent his e-mail with  
20 an attachment. I don't believe that was  
21 attached to the document that we received. But  
22 in any event, Mr. Mulcahy responded at the top  
23 of the e-mail chain. And is it fair to say  
24 that in substance --  
25 MR. MORRIS: I think if we could keep

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1 BH EQUITIES, LLC - D. MILLER  
2 ever told anybody acting on behalf of  
3 BH Equities of that -- of that issue prior to  
4 the time you received this e-mail?  
5 MR. DOHERTY: Objection, form.  
6 A. I don't know that there was anything  
7 specifically said in that regard. I'm not  
8 aware of anything that specific. We knew of  
9 the bankruptcy from both -- from public -- or  
10 not both, but from public forums, and we knew  
11 that would have an impact, being that it was a  
12 direct partner. I don't recall any -- or know  
13 of any very specific conversation with HCRE  
14 about what impact it was going to have.  
15 BY MR. MORRIS:  
16 Q. Did anybody from HCRE ever describe  
17 for BH Equities the impact that the bankruptcy  
18 would have on SE Multifamily or HCRE's ability  
19 to make distributions prior to the sending of  
20 this e-mail?  
21 MR. DOHERTY: Objection, asked and  
22 answered.  
23 You may answer, Mr. Thomas, the  
24 question.  
25 A. Okay. Not to my knowledge.

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1 BH EQUITIES, LLC - D. MILLER  
2 scrolling up. Yeah.  
3 BY MR. MORRIS:  
4 Q. Is it fair to say in substance that  
5 BH Equities was willing to accept the  
6 distributions so that it could repay the  
7 third-party debt that it had incurred but still  
8 wanted to get the remaining funded capital out  
9 of SE Multifamily?  
10 A. I might say it slightly differently.  
11 Q. Okay.  
12 A. HCRE was the manager.  
13 Q. Yep.  
14 A. And they instructed us to do  
15 something as the manager of the entity, and  
16 that was done. But, yes, as it's stated  
17 clearly here, we hope to find a solution to get  
18 our remaining 6.2 million of capital out as  
19 well.  
20 Q. Okay.  
21 MR. MORRIS: Let's go to the next  
22 exhibit, please, Exhibit 13.  
23 (Exhibit 13 marked.)  
24 BY MR. MORRIS:  
25 Q. So this is seven months later.

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2 Exhibit 13 is a two-page document Bates

3 numbered BH 173 to 174. The second page is

4 just an icon. And at that e-mail at the bottom

5 of the first page, Mr. Mulcahy is raising the

6 exact same issue that he had raised seven

7 months earlier, and that is BH Equities wanted

8 the return of its capital; is that fair?

9 A. Yes.

10 Q. Okay. And, in fact, that

11 \$6.258 million that he refers to in his e-mail,

12 that's the same amount that he referred to in

13 his e-mail back in November of 2020, because no

14 capital had been distributed since that time,

15 correct?

16 A. Correct.

17 Q. And BH Equities pointed out that SE

18 Multifamily had \$8 million in its bank account,

19 and so it wanted every dollar of invested but

20 unreturned capital repatriated to it, correct?

21 A. Yes.

22 Q. And if you scroll up, Mr. McDermott

23 again calls others to the table, in this case

24 Mr. McGraner and Rob Harris. Do you see that?

25 A. Yes.

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2 had all of its capital returned or at least

3 credited to it?

4 A. I believe -- my apologies. We're

5 talking about HCRE, correct?

6 Q. Yes.

7 A. I believe it was in 2020 when they

8 had received all of their invested capital

9 back.

10 Q. So -- and is that because all of

11 their invested capital, to the best of

12 BH Equities' understanding, was borrowed from

13 third parties?

14 A. Yes.

15 Q. And so the deal was to repatriate all

16 capital contributions that were sourced from

17 third parties, correct?

18 A. Yes.

19 Q. So it's BH Equities' understanding

20 that HCRE did not put in any of its own capital

21 in connection with the funding of

22 SE Multifamily, correct?

23 A. Its own capital being that that

24 wasn't borrowed from a third party, yes, that's

25 correct.

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2 Q. And at the top, Mr. McGraner -- no,

3 withdrawn.

4 At the top, Mr. McDermott informs

5 Mr. Mulcahy that Mr. McGraner has approved the

6 repatriation of the remaining unpaid capital to

7 BH Equities. Do I have that right?

8 A. Yes.

9 Q. And so, in fact, in June of 2021,

10 BH Equities got the last of its capital

11 investment out of SE Multifamily, correct?

12 A. Yes.

13 Q. Does SE -- withdrawn.

14 Does BH Equities know whether all of

15 HCRE's original capital contribution has been

16 repatriated?

17 A. We believe it has at that point.

18 Q. Does BH Equities know whether the

19 capital contribution made by Highland Capital

20 Management was returned to it?

21 A. As of the date of this e-mail, we

22 don't believe it has.

23 Q. Do you know when HCRE's capital

24 contribution was repatriated in full? When was

25 either the month or at least the year when HCRE

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1 BH EQUITIES, LLC - D. MILLER

2 Q. Okay. And that's why it got paid --

3 well, withdrawn.

4 That's why it was credited with the

5 return of all of its capital before

6 BH Equities; is that fair?

7 A. Yes.

8 MR. DOHERTY: Mr. Morris -- and you

9 can tell me -- I believe that the witness

10 misunderstood a question a couple back

11 about Highland Capital. I can --

12 MR. MORRIS: Sure, go ahead.

13 MR. DOHERTY: -- identify it now.

14 Okay. You asked about whether he

15 knew Highland Capital had been -- had

16 their capital returned, the 49,000; is

17 that right?

18 MR. MORRIS: Yep.

19 MR. DOHERTY: And then I think

20 Mr. Thomas said as of -- he, I think,

21 added a qualifier, as of the date of this

22 e-mail it hadn't.

23 MR. MORRIS: Right.

24 MR. DOHERTY: But did you mean

25 what -- so was that the intent of your

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2 question, or was it had it been returned

3 at all?

4 MR. MORRIS: I appreciate that.

5 Well, let me try and clean that up, Casey.

6 BY MR. MORRIS:

7 Q. Mr. Thomas, as of the time that --

8 withdrawn.

9 Do you know whether HCMLP's \$49,000

10 was original out-of-pocket capital or whether

11 HCMLP borrowed that money as that third-party

12 debt?

13 A. I don't know for certain, as we

14 haven't traced the source, but we're led to

15 believe that it was not borrowed capital.

16 Q. Okay. So in 2020, all borrowed

17 capital was paid back in full, correct?

18 A. Yes.

19 Q. And to the best of BH Equities'

20 knowledge, all of HCRE's capital was borrowed,

21 correct?

22 A. Yes.

23 Q. And by June 2021, all of BH Equities'

24 capital contribution was paid back or credited

25 in full, correct?

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2 Q. Did BH Equities ask that question?

3 A. I don't believe so.

4 Q. All right. Let's go to -- just two

5 more documents, sir. Let's start with some tax

6 returns.

7 (Exhibit 14 marked.)

8 MR. MORRIS: Can we go to Exhibit 14,

9 which is BH 10 through 75.

10 BY MR. MORRIS:

11 Q. Are you aware that BH Equities

12 produced in response to the subpoena

13 SE Multifamily's tax returns, including K-1s

14 for 2019?

15 A. Yes.

16 Q. And did you review those in

17 preparation for today's deposition?

18 A. Yes.

19 Q. And the document that's on the screen

20 is a cover letter. Do you see that?

21 A. Yes.

22 Q. Is BH Equities aware that a firm

23 called Barker Viggato prepared the tax returns

24 for SE Multifamily?

25 A. Yes.

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1 BH EQUITIES, LLC - D. MILLER

2 A. Yes.

3 Q. And that's both the third-party debt

4 as well as the original sourced funding,

5 correct?

6 A. Yes.

7 Q. But HCMLP is the only member who had

8 no capital returned to it, at least as of June

9 2021, correct?

10 A. Correct.

11 Q. Do you know why HCRE and BH Equities

12 was made whole by June 2021 but HCMLP was not?

13 A. That was how we were directed to make

14 payments by the manager.

15 Q. And who on behalf of the manager

16 directed you to make the payments in that

17 manner?

18 A. We coordinated through Mr. McDermett,

19 but it was -- as you can see with his e-mail

20 exchange, I believe the discussion was had with

21 Mr. McGraner, potentially others.

22 Q. Did anybody acting on behalf of the

23 manager explain to BH Equities why it was not

24 instructing BH Equities to make HCMLP whole?

25 A. No.

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2 Q. And do you see that this is a

3 letter -- the first page of this exhibit is a

4 letter from Barker Viggato dated September 9,

5 2020?

6 A. Yes.

7 Q. Okay. And can you confirm that

8 BH Equities received this letter with the

9 attachments in or around September 2020?

10 A. Yes.

11 Q. All right. Do you know who was

12 responsible for communicating with Barker

13 Viggato on behalf of SE Multifamily? Was that

14 the manager's job?

15 A. Yes.

16 Q. Okay. I'm not asking -- do you know

17 who on behalf of the manager was primarily

18 responsible for communicating with Barker

19 Viggato?

20 A. I do not.

21 Q. Is it BH Equities' understanding that

22 under the terms of the amended agreement that

23 the manager was responsible for causing SE

24 Multifamily's tax returns to be prepared?

25 A. Yes.

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2 Q. Okay. Is it BH Equities'

3 understanding that the manager was responsible

4 for providing the information that Barker

5 Viggato needed to prepare SE Multifamily's tax

6 returns?

7 A. Yes.

8 Q. Has Barker Viggato been the firm that

9 has prepared SE Multifamily's tax returns since

10 SE Multifamily was formed in August of 2018?

11 A. I don't recall specifically if they

12 did the 2018 return. I do know they did '19

13 and '20.

14 Q. I appreciate the specificity.

15 So we can take a look at anything you

16 want in this document. If we turn to the next

17 page, we'll see that it says 2019 Tax Return

18 Filing Instructions. Do you see that?

19 A. Yep.

20 Q. Do you know if SE Multifamily's tax

21 returns for 2019 were ever amended?

22 A. Not to my knowledge.

23 Q. Did BH Equities have any discussions

24 with anybody at any time over whether

25 SE Multifamily's 2019 tax returns should be

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2 BY MR. MORRIS:

3 Q. Do you see 19a refers to

4 distributions of cash and marketable

5 securities?

6 A. Yes.

7 Q. And the number there is \$267 million?

8 Do you see that?

9 A. Yes.

10 Q. Is that the return of the third-party

11 debt that we've been talking about, if you

12 know?

13 A. The majority of it would have been,

14 yes.

15 Q. Okay. Do you know what portion of

16 that would have related to a distribution other

17 than the repayment of third-party debt?

18 A. I don't specifically without, you

19 know, referencing the work papers or things

20 like that.

21 Q. Okay. Hold on one sec.

22 Do you know, who authorizes the

23 making of distributions on behalf of SE

24 Multifamily?

25 A. The manager would do that.

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2 amended?

3 A. Could you scroll in here? There

4 should be the allocation of BH Equities in

5 this. And in one of the years -- and I don't

6 recall if it was '19 or '20 -- we did have a

7 question about, you know, allocations. So...

8 Q. Okay. And would that be the K-1?

9 A. Yes.

10 Q. Okay. We'll get to that in just a

11 moment, and then we'll come back to the

12 question of amendment at that time.

13 Are you aware that K-1s for each of

14 the members of SE Multifamily were included in

15 the package of documents prepared by Barker

16 Viggato?

17 A. Yes.

18 Q. Did BH Equities -- withdrawn.

19 Do you know whether any K-1 that was

20 issued to any member of SE Multifamily was ever

21 amended?

22 A. Not to my knowledge.

23 MR. MORRIS: Let's go to Bates number

24 17, please. And if we could scroll down

25 to line 19a. Yeah, there you go.

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2 Q. And who does BH Equities understand

3 the manager to be?

4 A. HCRE Partners.

5 Q. Let's go to Bates number 21, please.

6 MR. DOHERTY: When you're saying

7 Bates 21, Mr. Morris, is that our Bates

8 numbering? Okay, thank you. Okay.

9 BY MR. MORRIS:

10 Q. So this is Schedule B-1. Do you see

11 that?

12 A. Yes.

13 Q. And Highland Capital Management, L.P.

14 is identified as an entity owning 50 percent or

15 more of the partnership. Do you see that?

16 A. Yes.

17 Q. And Highland Capital Management,

18 L.P.'s interest is fixed at 94 percent. Do you

19 see that?

20 A. Yes.

21 Q. And is it BH Equities' understanding

22 that that 94 percent is a reference to that

23 Section 6.4 where 94 percent of the profits and

24 losses are allocated to HCMLP?

25 A. Yes.

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2 A. Correct.

3 Q. And nobody ever suggested that either

4 HCMLP's or HCRE's or BH Equities' 2019 K-1s

5 were incorrect in any way, correct?

6 A. Correct.

7 Q. Okay. Do you see there's a

8 distribution there in Box 19 of \$46,000?

9 A. Yes.

10 Q. Do you have any idea why BH Equities'

11 K1 for 2019 shows that it received a

12 distribution of \$46,926?

13 A. No, other than seeing there's a

14 footnote A or a notation A next to it, which

15 may have more description.

16 MR. DOHERTY: Mr. Morris, can you

17 show the witness A? May I ask that?

18 MR. MORRIS: Yeah, I'm looking for

19 it. I actually -- if we could scroll

20 down, the next -- the next page is Code Z.

21 The next page -- I don't see it there.

22 Yeah, I don't see it. So I'll just move

23 on. I can only work with what I have.

24 BY MR. MORRIS:

25 Q. And then let's go to Bates number 70,

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2 to the amended agreement was ever made to

3 change the allocation set forth in Section 6.4,

4 right?

5 A. Not that I'm aware.

6 MR. MORRIS: Let's go to the last

7 exhibit, 15, BH 76 to 78.

8 (Exhibit 15 marked.)

9 BY MR. MORRIS:

10 Q. And do you see this is BH Equities'

11 K-1 for 2020?

12 A. Yes.

13 Q. All right. Let's just scroll down a

14 little bit. It's just a two-page -- I guess

15 it's a three-page document.

16 In looking at it, does it refresh

17 your recollection -- I had asked you earlier

18 whether there was ever any discussion at any

19 time about filing an amendment to any of SE

20 Multifamily's tax returns or the K-1s at issue.

21 Do you remember that question?

22 A. Yes, I remember that question.

23 Q. And I think you testified that there

24 may have been?

25 A. We had questions. If you could

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2 please. And this is the K-1 for Liberty,

3 correct?

4 A. Yes.

5 Q. And they have zero percent capital at

6 the beginning of the year and at the end of the

7 year because they didn't make an equity

8 investment in SE Multifamily, correct?

9 A. It was a preferred equity investment,

10 which would be treated differently.

11 Q. Correct. And they got distributions

12 of approximately \$17 million, as reflected in

13 paragraph -- in Section 19, because they were

14 preferred holders and they were entitled to get

15 paid first, correct?

16 A. Yes.

17 Q. Do you know why they were allocated

18 3.6 percent of the profits and losses in 2019?

19 A. I don't, no.

20 Q. Did you know that they were allocated

21 3 percent of the profits and losses in 2019

22 before now?

23 A. Only from reviewing the documentation

24 and things.

25 Q. No agreement was ever -- no amendment

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2 scroll up on this. We were curious as to why

3 there was no allocation in Box 1 or 2 to

4 BH Equities in 2020.

5 Q. Oh, okay. So the question was why

6 did BH Equities not receive any allocation of

7 ordinary business income or net rental income

8 from the real estate; is that right?

9 A. Correct.

10 Q. Did BH Equities ever get an answer to

11 that question?

12 A. I don't believe we did.

13 Q. But BH Equities' allocation of

14 profits and losses doesn't seem to have

15 changed, right? It's the same 5.78 percent as

16 it was in 2019, at least according to the K-1s,

17 correct?

18 A. Correct.

19 Q. Do you know if this K-1 was reported

20 to the IRS?

21 MR. DOHERTY: Objection, form. What

22 is reported? Was it filed, John?

23 MR. MORRIS: Yeah, that's a fair

24 question.

25

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1 BH EQUITIES, LLC - D. MILLER

2 BY MR. MORRIS:

3 Q. Yeah. Do you know if this K-1 was

4 ever filed with the IRS?

5 A. I don't. It would have been the

6 manager's responsibility to file the tax return

7 on behalf of the entity, and then BH Equities,

8 given our complex nature, you know, has a very

9 complicated tax return. So its information

10 would have been used in the broader

11 BH Equities' filing, but we wouldn't have sent

12 this directly attached to our tax return, per

13 se.

14 Q. Okay. I appreciate the

15 clarification.

16 Did BH Equities rely on the

17 information in this K-1 to prepare its tax

18 returns for 2020?

19 MR. DOHERTY: Object. I don't -- I'm

20 just making this objection in caution. I

21 think this is a little outside the scope.

22 I mean, I know if you're going places, but

23 if this involves, like, tax advice from

24 attorneys or something, then don't go into

25 detail on that. I just wanted to -- it's

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2 taxes.

3 Q. Why did BH Equities take a different

4 course? What does that mean?

5 MR. DOHERTY: Objection, form.

6 BY MR. MORRIS:

7 Q. You can answer.

8 MR. DOHERTY: Well, you can answer --

9 again, I think this is outside the scope,

10 but if it involves outside attorney's

11 advice about your taxes, then you need to

12 be careful if you need to -- if you think

13 you're getting attorney advice, then you

14 need to be careful.

15 A. Yeah, I think it would be just

16 related to internal decision making.

17 BY MR. MORRIS:

18 Q. Internal decision making is not a

19 reason to not share the answer with me.

20 MR. DOHERTY: Mr. Thomas, if it's

21 legal counsel, then --

22 MR. MORRIS: Then you should say so.

23 Then you should say so.

24 MR. DOHERTY: Right.

25 If you can answer without that, then

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2 fair. If there's a question pending, you

3 can answer the question.

4 BY MR. MORRIS:

5 Q. Look, the question is really simple,

6 Mr. Thomas. Is this a draft document, or is

7 this something that BH Equities has actually

8 relied upon in the preparation of its tax

9 returns for 2020?

10 A. Those aren't necessarily the same

11 question. Or it's not --

12 Q. I understand. I'm trying to clean it

13 up and make it as simple as I can to show

14 you --

15 A. Well, there's not -- sorry to be

16 difficult. Those aren't the only two

17 possibilities. And my understanding is

18 we may -- we may have taken a different stance

19 as it is our tax return. So that's why I'm --

20 I'm saying it was not delivered to us as a

21 draft so that we believed this was the K-1

22 delivered to us, even though we had questions.

23 I can't affirm -- I can't say that we

24 relied on it because I believe we took a

25 different course, as is our right with our

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2 you can answer the question.

3 A. We just took a more conservative

4 approach and allocated 6 percent of the net

5 income into our tax liability, given the

6 complexity of our return.

7 BY MR. MORRIS:

8 Q. I just want to make sure that I

9 understand correctly, that notwithstanding

10 what's stated on this K-1, BH Equities made the

11 decision to allocate to itself 6 percent of

12 SE Multifamily's profits in 2020; is that

13 right?

14 A. For the purposes of taxes, yes.

15 Q. Yes. Okay. Did BH Equities ever

16 discuss that decision with anybody acting on

17 behalf of HCRC?

18 A. No.

19 Q. Did BH Equities ever discuss that

20 decision with anybody acting on behalf of

21 Barker Viggato?

22 A. No.

23 Q. Did BH Equities ever discuss this K-1

24 with anybody at Barker Viggato?

25 A. I don't know for sure. I know there



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2 was an e-mail request -- or an e-mail ask on  
3 this K-1, and I don't know for sure if Barker  
4 Viggato people were included or not on that or  
5 if it was just directed to HCRE.  
6 Q. Okay.  
7 MR. MORRIS: If we can scroll down  
8 just a little bit.  
9 BY MR. MORRIS  
10 Q. Do you see Box L?  
11 A. Yes.  
12 Q. And there's an ending capital account  
13 of approximately \$8.5 million. Do you see  
14 that?  
15 A. Yes.  
16 Q. Since all of the original funded  
17 capital has been returned with the exception of  
18 Highland's \$49,000, is it fair to say that that  
19 number, \$8.5 million, equals approximately  
20 6 percent of the capital accounts among the  
21 members of SE Multifamily?  
22 A. The tax capital account, yes. That  
23 would be my understanding.  
24 Q. Okay. So that -- would it be  
25 BH Equities' expectation that HCMLP's capital

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1 BH EQUITIES, LLC - D. MILLER  
2 finish this up. If we could go back to the  
3 subpoena, which I think was Exhibit 1. Again,  
4 page 2 of the exhibit, PDF page 9 of 13. And I  
5 know I asked a couple of questions, but I said  
6 we'd come back to it.  
7 So we're on topic 4, and remember I  
8 defined what's in the parenthetical there as  
9 HCRE's contention. Do you remember that?  
10 A. Yes.  
11 Q. Okay. Really, I don't have a lot  
12 here. Do you recall when BH Equities first  
13 learned of HCRE's contention as set forth in  
14 topic 4?  
15 A. I believe it would have been, I don't  
16 know, a few days after filings or something  
17 along those lines, as we tried to pay  
18 attention.  
19 Q. When do you think it was?  
20 A. Shortly after the filing of it, once  
21 it was on the public record.  
22 Q. And how did -- how did BH Equities  
23 learn of the contention?  
24 A. I think we'd been an interested party  
25 in the case as it relates to SE Multifamily, so

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2 account would be approximately five to six  
3 times bigger than that because they have a  
4 46.06 percent residual interest?  
5 A. Not necessarily.  
6 Q. Is there a relationship between  
7 BH Equities' capital account and the capital  
8 accounts of the other members, given that all  
9 of the original capital contributions have been  
10 paid in full but for HCMLP?  
11 MR. DOHERTY: Objection. I think  
12 that mischaracterizes --  
13 MR. MORRIS: You've got the -- you've  
14 got the objection. I'm going to cut you  
15 off this time.  
16 A. Relationship, yes. But it's not a  
17 direct linear relationship given how tax --  
18 given how tax remedies work and allocations of  
19 profit and loss, capital, those things. So  
20 it's not a simple linear relationship.  
21 BY MR. MORRIS:  
22 Q. All right. Let's shift gears now,  
23 last topic, no documents. Actually, just hold  
24 on one second.  
25 Okay. Let's just shift gears and

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1 BH EQUITIES, LLC - D. MILLER  
2 we were paying attention to the court records  
3 and things.  
4 Q. Did BH Equities have any source of  
5 information other than court records by which  
6 it learned of HCRE's contention?  
7 A. I don't believe so.  
8 Q. Okay. So is it fair to say that to  
9 the best of your recollection, BH Equities  
10 relied exclusively on what was on the court  
11 record in order to learn about HCRE's  
12 contention?  
13 A. To the best of my knowledge.  
14 Q. Okay. Do you know whether BH  
15 Equities has ever discussed this contention  
16 with anybody at HCRE?  
17 A. Not to my knowledge.  
18 Q. Do you know if anybody acting on  
19 behalf of BH Equities has ever communicated  
20 with anybody at HCRE concerning the contentions  
21 set forth in topic 4?  
22 A. Not to my knowledge.  
23 Q. Do you know whether HCRE, in its  
24 capacity as the manager, has ever done anything  
25 to address the mistake that's described in its



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1 BH EQUITIES, LLC - D. MILLER

2 contention other than file with a proof of

3 claim?

4 A. Not to my knowledge. I don't believe

5 so.

6 Q. And also with -- they also, at least

7 in November 2020, decided to withhold --

8 withdrawn.

9 Other than responding to the

10 subpoena, has BH Equities done anything in

11 response to learning about the contentions set

12 forth in paragraph -- topic 4?

13 MR. DOHERTY: Objection. If this --

14 if this involves legal discussions, then

15 you are not to answer, but you can follow

16 the question.

17 A. I don't believe we've taken any --

18 any business action in regard to this

19 contention.

20 BY MR. MORRIS:

21 Q. Okay. Does BH Equities have a view

22 as to whether the contention is fair and

23 accurate?

24 MR. DOHERTY: Objection.

25

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2 SE Multifamily improperly allocated the

3 ownership percentages of the members thereto

4 due to mutual mistake, lack of consideration,

5 and/or failure of consideration?

6 A. Yes. We do not have a position on

7 that.

8 MR. MORRIS: I have no further

9 questions.

10 MR. DOHERTY: Mr. Morris, I'd like to

11 ask one or two questions on redirect to

12 clarify something. Is that okay to do it

13 now, or would you like a --

14 MR. MORRIS: No, I think you should

15 do it now.

16 EXAMINATION

17 BY MR. DOHERTY:

18 Q. Mr. Thomas, I'm going to ask you a

19 couple of questions as if we were in court, you

20 know, as you were with Mr. Morris.

21 During the testimony, I believe --

22 I'm unsure how it came about exactly, but you

23 were asked questions that did Highland Capital

24 Management ever receive their capital

25 contribution back, and you answered at one

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2 BY MR. MORRIS:

3 Q. Well, let me ask a different

4 question. Does BH Equities believe that the

5 organizational documents relating to

6 SE Multifamily improperly allocate the

7 ownership percentages of the members thereto

8 due to mutual mistake, lack of consideration,

9 and/or failure of consideration?

10 MR. DOHERTY: Objection.

11 BY MR. MORRIS:

12 Q. You can answer.

13 MR. DOHERTY: Form.

14 You can answer, Mr. Thomas.

15 A. I don't know that I can answer

16 specifically because, again, we viewed it as a

17 bilateral negotiation at the time, and that

18 would take into account the parties'

19 consideration that we just didn't have -- we

20 weren't privy to nor frankly had an interest in

21 knowing at the time.

22 BY MR. MORRIS:

23 Q. Is it fair to say that BH Equities

24 does not have a position as to whether or not

25 the organizational documents relating to

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2 point that they had not received it as of June

3 9th, 2021; is that correct?

4 A. That is correct.

5 Q. Were you referring to the \$49,000 in

6 capital that's reflected on Schedule A?

7 A. Yes.

8 Q. Has Highland Capital, to BH's

9 knowledge, now received that \$49,000?

10 A. Yes.

11 MR. DOHERTY: No further questions.

12 MR. MORRIS: I have nothing further.

13 MR. GAMEROS: No questions, either.

14 (Discussion off the record.)

15 MR. DOHERTY: And for the transcript,

16 now that we're on the phone, is that

17 something where y'all will -- we'll get it

18 e-mailed to us for checking it for errata

19 and everything --

20 MR. MORRIS: Sure.

21 MR. DOHERTY: -- Ms. McMoran?

22 THE REPORTER: Yes, for read and

23 sign, we'll send it to you, Mr. Doherty.

24 Mr. Gameros, did you need a copy of

25 this one, too?